No. 11286

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation and CLYDE BRUCKMAN,

Appellees.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME II

(Pages 273 to 544, Inclusive)

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

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(Testimony of James Geller)

Q. Oh, there is a difference in connection with it that enters into the box office receipts?

A. That is right.

Q. Sometimes, or very often, stars make very bad pictures, don't they? A. That is correct.

Q. And sometimes people who are unknown make very good pictures? A. That is correct.

Q. And the eventual test is how many nickels roll into the box office; isn't that right?

A. I assume so, naturally.

Q. We have a picture out here that played for five weeks at the Ritz, Anchors Aweigh; do you recall that?

A. I do.

Q. Do you think that had any word-of-mouth advertising? A. I beg your pardon?

Q. Do you think that had any word-of-mouth advertising? A. It has.

Q. And the word-of-mouth advertising was responsible for keeping that picture there five times the usual playing time; isn't that right?

A. That is correct.

Q. Harold Lloyd has had bad pictures, hasn't he? [266]

A. I assume so. I am not familiar with every one of his pictures. I saw a great many of them.

Q. Some of them you thought were pretty good?

A. I thought so.

Q. What do you attribute the succesful—

A. Good at that time. Pardon me. Good at that time. I want to qualify that. For the time it was made, it was good.

(Testimony of James Geller)

Q. Do you have any idea what pictures made by Harold Lloyd grossed? A. I imagine—

The Court: I don't know what the materiality of that is.

Mr. Fendler: Very important element in going into these things, your Honor.

The Court: You said "pictures," didn't you?

Mr. Fendler: Yes, sir.

The Court: All of them?

Mr. Fendler: No, generally what they grossed, the bracket.

The Court: We are only interested in the one picture.

Q. By Mr. Fendler: Do you know what Movie Crazy grossed? A. I have no idea.

Q. Well, in computing the re-issue or re-make rights [267] does not the record of what the picture has done previously have any influence?

A. Not when a decade has passed after the picture was made.

Q. How many years elapsed between the time that Universal first issued Claudette Colbert in Imitation of Life and the time it was re-issued by Universal?

A. I imagine quite a number of years.

Q. Ten years is the usual time that elapses between the usual release of a picture and the re-issue, isn't it, ten or twelve years?

A. Is the usual time, you say?

Q. Yes.

A. I don't know that to be a fact at all.

(Testimony of James Geller)

Q. You have never produced any pictures at all, have you?

A. No. I have been connected with them.

Q. You have never distributed any pictures?

A. No, I haven't.

Q. You have never sold any pictures to exhibitors?

A. No.

Q. You have never as a matter of fact had much to do with what pictures paid at the box office, have you?

A. Except as an observer, one being interested in motion pictures. I have been interested in them. [268]

Q. Just like the ordinary layman, isn't that right?

A. No, not like the ordinary layman. I am connected in the amusement industry and I make it my business to learn as much as I can about it.

Q. Will you tell the court how many pictures have been re-issued by Universal within the past ten years?

A. I haven't the figures at all.

Q. Are they available to you?

A. I haven't seen any of them that have been re-issued.

Q. You don't know of any Universal pictures that have been re-issued?

A. Oh, there is undoubtedly some pictures that have been re-issued, including the Imitation of Life.

Q. How about the Irene Dunne pictures? Were any Irene Dunne pictures ever re-issued by Universal?

A. I don't know.

(Testimony of James Geller)

Q. You don't know whether the gross on re-issue paid for the advertising or prints of re-issue or not, do you, on the pictures that Universal did re-issue?

A. I have no idea.

Q. You have no basis for testifying, then, that the Lloyd picture Movie Crazy, if re-issued, would not pay for the advertising and prints, have you?

A. I have.

Q. Is there available to you, as story editor at Universal, [269] the list of pictures which Universal has re-issued during the past ten years? A. Of course.

Q. And is there available to you the amounts paid for advertising and prints upon those pictures and the amounts grossed?

A. It could be gotten, with a great deal of travail.

Q. Can you get a brief resume without too much travail?

Mr. Lewinson: I object to that on the ground it is utterly immaterial.

Mr. Fendler: It is very important, if your Honor please.

Mr. Lewinson: It is not important at all. You are going into—

Mr. Fendler: In a case where a story editor testifies that the re-issue—I won't argue it. I think it is apparent.

Mr. Knupp: If the court please, they are entirely different pictures.

The Court: I don't want to hear from any of you. The objection is sustained.

Testimony of James Geller)

Mr. Fendler: We offer to show, if your Honor please, by the records which we have requested the witness—

The Court: Mr. Fendler, your questions are directed solely to the qualification of this witness as an expert?

Mr. Fendler: Oh, not at all, your Honor.

The Court: He is offered as an expert. [270]

Mr. Fendler: No. If your Honor please, these questions go to the entire testimony elicited upon direct examination and they go to the entire subject matter.

The Court: It simply goes to the weight to be given to his testimony, as I view it.

Mr. Fendler: But we can also elicit any facts from an agent or officer of the defendant corporation, your Honor. This man is an agent of the defendant corporation.

The Court: He was offered as an expert witness to show that the picture had no value. The questions that were asked were to elicit from this witness testimony for the purpose of showing it had no re-make or no re-issue value; and you have been asking him questions which would tend to minimize his testimony as an expert. If he does not know these things, that is just one of the things he does not know.

Mr. Fendler: But, if your Honor please—

The Court: I have ruled.

Mr. Fendler: May I have an offer of proof, if your Honor please?

The Court: Yes, you may now.

Mr. Fendler: We offer to show, if your Honor please, by the records which we have asked the witnesses to

(Testimony of James Geller)

produce and which he states are in his custody, possession and control, relating to the list of pictures re-issued by Universal during the past ten years and the grosses received therefrom, as [271] well as the costs of advertising and for the prints in re-issue that sums of money in excess of $100,000 have been realized upon pictures which did not gross anywhere near as much as Movie Crazy and which starred people who were nowhere near as important then or now as Movie Crazy; and we offer it not only upon the issue of attacking the witness' direct examination but as testimony important to us upon the issue of the value of the re-issue rights.

Mr. Lewinson: To which offer we object on the grounds—

The Court: I have ruled, gentlemen; and on the further ground it is not proper cross-examination.

Q. By Mr. Fendler: Now, Mr. Geller, you testified that the basic feature of Movie Crazy has been done many times; that it was not novel; that it had been done by Merton of the Movies and otherwise. Were you aware of the fact that Merton of the Movies had been re-made?

A. Yes.

Q. Recently?

A. It has not been re-made; it has been sold, it has been sold. I don't think it has been re-made as yet.

Q. At least, it has been sold for the purpose of re-making currently, isn't that right?

A. It has been sold for a re-make. I don't know whether they are going to make it currently or keep it in the files. I have no ideas. [272]

(Testimony of James Geller)

Q. What was the price paid?

A. I have no idea.

Q. Do you know when Merton of the Movies was first released?

A. I assume—I think I do.

Q. When was it first released?

A. In the '20's sometime as a silent, and it might have been made as a talkie. I don't know.

Q. First made as a silent and then made as a talkie about the same time that the Harold Lloyd picture Movie Crazy was made, isn't that right?

A. I don't know. I saw the play as a play. I saw it in 1922, with Glenn Hunter in it, and then it was made by Paramount shortly after.

Q. And then it was re-made as a talkie by Paramount in 1932, was it not?

A. If you say so, I think so.

Q. Now it has just been re-sold as a re-make as a talkie under the title Merton of the Talkies, isn't that correct?

A. Well, I don't know. I assume so.

Q. You say that Movie Crazy has the same general theme as Merton of the Movies, is that right.

A. Yes.

Q. Yes. Well, bearing in mind the fact that Merton of [273] the Movies has been made first as a silent picture, then re-made ten years later as a talking picture, and now has just been re-sold, 12 or 13 years later, to be re-made, would you say that the theme has no value at all?

A. That theme has no value. It is not fair to compare Merton of the Movies with Movie Crazy. The difference in treatment and in writing is not a date. It would

(Testimony of James Geller)

be an insult to Harry Leon Wilson's memory to compare the plot of Movie Crazy to the drama and the play and the book of Merton of the Movies.

Q. Would it surprise you to know that Movie Crazy grossed more than Merton of the Movies when they were both released by Paramount within one year of the other?

A. At that time Harold Lloyd was a bigger star than Glenn Hunter, or whoever they put in the picture at that time.

Q. Harold Lloyd is still a star, isn't he?

A. No, he is not.

The Court: Now, gentlemen, you are getting down to an argument.

Mr. Lewinson: May I get the witness' answer to the question?

(Answer read by the reporter.)

Q. By Mr. Fendler: Weren't you aware of the fact that Harold Lloyd is now in a picture, as the star of a picture, [274] being produced, written and directed by Preston Sturgis?

A. I read something in the papers.

Q. Do you recall Preston Sturgis as an important producer?

Mr. Lewinson: That is objected to on the ground it is immaterial. The question itself shows Harold Lloyd has just started production apparently. The testimony is that he had not made a picture since 1937 and it remains to be seen whether he will be a star or a flop in this picture.

Mr. Fendler: If your Honor please, in the first place, I object to counsel coaching the witness; in the second place—

(Testimony of James Geller)

Mr. Lewinson: I object to that observation and assign it as misconduct.

Mr. Fendler: In the second place, I think the question which I asked is perfectly proper, in asking the witness, when he has testified that Lloyd is not in pictures anymore whether a star or otherwise, to ascertain whether he knows what is going on.

The Court: The witness may answer the question.

A. As I understand it, you did not ask me whether he is well known or not. I said that right now he is not starring, and the very fact that he has not made a picture yet, I don't know whether he will be a star.

Q. By Mr. Fendler: Would your answer be the same [275] about Charlie Chaplin?

The Court: Oh, now, that is getting argumentative, counsel: You want to argue with the witness all the time.

Q. By Mr. Fendler: You testified that Charlie Chaplin has re-issued his pictures; is that correct?

A. I said his pictures have been re-issued. I did not say that he re-issued them.

Q. Are you familiar with the amounts received upon the re-issues of the Chaplin pictures?

Mr. Lewinson: That is objected to on the grounds is is irrelevant and immaterial.

The Court: Objection sustained—I am going to admit it. He may answer that question, but not as to the amounts, to give an opportunity to develop this witness' information as to sales and he has testified as your expert, and on that ground as to his qualifications as an expert I will permit it.

Mr. Fendler: Will you read the question, Mr. Reporter, please?

(Testimony of James Geller)

(Question read by the reporter.)

A. I am not.

Q. Are you familiar with the amounts received upon the re-issue of anybody's pictures? A. I am not.

Q. Are you familiar with the fact that three Goldwyn [276] pictures have been re-issued within the past year which were made during the early 30's?

A. I am aware of it. I have read in the trade press that he sold the re-issue rights.

Q. You do not know what the consideration was?

A. No.

Q. You do not know what the returns have been?

A. I don't know because the returns are not in yet.

Q. Are you familiar with the fact that Alexander Korda has re-issued all of his pictures?

A. I haven't seen any of them played in town.

Q. You did not know whether they were being re-issued or not?

A. They might be re-issued. I haven't seen them.

Q. Isn't re-issue a matter of very lucrative income to producers, including Universal, and has it not been so well recognized for the past 20 years at least?

A. In my opinion, no.

Q. Well, you don't know what amounts have been received on any re-issues? A. No.

Mr. Fendler: All right; that is all.

The Court: We will take a five-minute recess at this time, gentlemen.

(Short recess.) [277]

The Court: Proceed, gentlemen.

Mr. Fendler: Your Honor, we have with us all of the film which was ordered into court this morning. We have all reached a stipulation and the opposing counsel—

The Court: I am not going to accept any stipulation. There has been too much child's play about these films and I am going to ask the clerk to mark them and impound them.

Mr. Fendler: If your Honor please, there is another print of So's Your Uncle available. It is satisfactory to the plaintiff to have the defendant retain possession—

The Court: Well, counsel, I have made my ruling and I am going to impound the pictures as exhibits, as any other exhibits in the case. There has been so much child's play about the handling of these exhibits and so much suspicion aroused as to integrity of the various parties who have had their hands on them, that I am not going to have any more argument about them.

The picture Movie Crazy will be marked as exhibit next in order, and So's Your Uncle next, and be exhibits in the case.

Mr. Fendler: If your Honor please, may I now ask for a release of your order of impoundment until ten o'clock tomorrow morning in order that the films may be exhibited to a very important witness at the studio this afternoon whom we propose to call in rebuttal? It is a situation where there [278] is apparently just one print of So's Your Uncle available.

The Court: If you can make arrangements with the clerk to accompany the picture and be in possession of it at all times I will do it, otherwise I will not.

Mr. Fendler: Both counsel will stipulate it may be done, both of defendants' counsel.

The Court: There has been so much quibbling over that stipulation that I have made my order.

Mr. Lewinson: We will stipulate in open court the order may be vacated.

Mr. Fendler: Thank you, Mr. Lewinson. Will you also, Mr. Knupp?

Mr. Knupp: Yes.

Mr. Fendler: After all, we own Movie Crazy and Mr. Knupp's client owns So's Your Uncle, and we do not have the slightest suspicion, and never have had, that anything would be done with it. Mr. Lewinson did want to be sure that they were properly identified so that if they had to be used—

The Court: Counsel, you cannot identify a film. All you can do is to mark the box and seal it, and the clerk hasn't any way to tell whether those are the same films in the boxes when they come back as when they went out. Mr. Lewinson raised all these objections and I am going to quiet them right now. I have made my rulings and I am not accepting a stipulation. [279]

Mr. Fendler: If your Honor please, may the impoundment be at ten o'clock tomorrow morning instead of ten o'clock this morning? It is most important to the plaintiff that the film be made available this afternoon and evening.

The Court: I haven't any objection to him impounding them tomorrow morning.

Mr. Fendler: Very well, we will have the films down here tomorrow morning.

The Court: I am going to have them impounded in this case.

Mr. Lewinson: I would like to say for the record, if I may, that I have been entirely misunderstood. I have

not intended to cast any suspicion either on counsel or his client.

The Court: Just a moment; gentlemen, I don't care to hear any explanation.

Mr. Lewinson: I just want to state that for the record, your Honor.

The Court: I just want you to proceed with the case so I can hear the evidence.

Mr. Fendler: May they be removed, then, if your Honor please, and I will have them in here at ten o'clock in the morning? Do you want to have the Columbia film marked?

Mr. Knupp: If the court please, I brought this to court this morning. I think it ought to be marked at the same time or be brought back tomorrow morning, whichever the court [280] thinks proper.

Mr. Fendler: May we defer it until tomorrow?

Mr. Knupp: It is all right with me.

Mr. Fendler: We will take all the responsibility to see that these films are in here at ten o'clock in the morning.

Mr. Knupp: I would like at this time, if the court please, to offer that into evidence—it has never been marked at all—and have the clerk put some kind of a mark on it. I don't care what he puts on it.

The Court: It may be so marked.

Mr. Fendler: No objection.

The Court: I thought it was marked originally.

Mr. Fendler: This is the two-reeler.

Mr. Knupp: No, we have not marked it, if the court please. This is the Columbia picture.

The Court: It will be marked next in order.

The Clerk: Exhibit C; So's Your Uncle, will be marked Defendants' D; and the other picture, Movie Crazy, will be marked Plaintiff's Exhibit 4. The Columbia picture, Loco Boy Makes Good, will be marked Defendants' Exhibit E.

The Court: Are you through with this other witness?

Mr. Knupp: Yes. Mr. Blake. [281]

FOSTER BLAKE,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please?

The Witness: Foster Blake.

Direct Examination.

By Mr. Knupp:

Q. Mr. Blake, what is your business?

A. I am branch manager of Universal Film Exchanges.

Q. And for how long have you occupied that position?

A. My present position, two years and three months.

Q. And what is the connection between Universal Film Exchange and the defendant Universal Pictures Company, Inc.?

A. We are the distributing branch of the parent company.

Q. That is to say, the defendant corporation produces the pictures and when they are produced and released they are turned over to you for distribution to the exhibitors? A. Yes, sir.

Mr. Fendler: Mr. Knupp, may I interrupt to ask for a stipulation that the Universal Film Exchanges, Inc., is

(Testimony of Foster Blake)

a wholly owned subsidiary of the defendant Universal Pictures Company, Inc.? [282]

Mr. Knupp: That is so stipulated.

Mr. Lewinson: Yes. I am delighted to join in that stipulation.

Q. By Mr. Knupp: What territory does your district cover, Mr. Blake?

A. We cover the entire state of Arizona, Southern California from half way to San Francisco southward, and a few towns in Southwestern Nevada.

Q. And that territory has been in your exchange district at all times since you have been manager of the Exchange? A. Yes, sir.

Q. Did you have charge of the distribution of the motion picture So's Your Uncle in your exchange district?

A. Yes, sir.

Q. Have you any records with you, Mr. Blake, showing the revenue derived from the distribution of that picture? A. I have.

Q. Will you produce them?

Mr. Fendler: That is objected to as incompetent, irrelevant and immaterial and outside any issue of damages. On a matter of profits, it would be a piecemeal situation where we would have to call the branch managers in of 17 branches, or something of that sort. It was my understanding, your Honor, when your Honor denied my motion this morning [283] that we were not going into the matter of profits at this time.

The Court: I understood that if it came to profits, it was intimated that you probably would be able to stipulate as to the profits of the picture; if not, that it would be referred to a special master.

(Testimony of Foster Blake)

Mr. Knupp: That was not my purpose, if the court please. The purpose I had in asking this question was to indicate to the court the relative extent to which this picture was produced or was distributed in comparison with other pictures.

Mr. Fendler: Objected to as immaterial and incompetent and outside of the issues.

Mr. Knupp: The question of whether or not the distribution of this picture may have affected the re-issue or re-make rights of the plaintiff's picture is directly affected by the extent to which this picture has been disdistributed. I was attempting to show by this witness, comparatively, the distribution of this picture and other pictures which were distributed at the same time.

Mr. Fendler: You may have a situation, your Honor, where, in Southern California, the distribution was very slight and in New York it was very great; and unless we are going to have the whole picture presented, why, a piecemeal picture is of no value. And we object to it as outside of the issues in the case. [284]

Mr. Knupp: Yesterday, your Honor—

The Court: Just a moment, gentlemen. I do not care to hear any argument. One set of experts or one expert says it is not worth anything and the other says it is worth three or four hundred thousand dollars. I am going to hear all the evidence. The objection is overruled. I realize that he can only testify as to a limited territory.

Q. By. Mr. Knupp: How many exchange districts are there in the United States?

The Court: The court will be the judge of the weight of it.

(Testimony of Foster Blake)

Mr. Knupp: Withdraw that question. Will you answer the last question, Mr. Blake?

Will you read the last question, Mr. Reporter?

(Previous question read by the reporter.)

Q. Have you that record with you?

A. Yes, sir (producing paper).

Q. I show you the record which you have handed to me, Mr. Blake, and ask you if that record is kept in the regular course of your business? A. Yes, sir.

Q. It is part of your regular business records?

A. The regular report we get from the home office every two weeks showing the cumulative revenue on a few pictures. [285]

Q. Can you determine from that what revenue was derived from this picture in your district?

A. Yes, sir.

Q. How much?

Mr. Fendler: Just a moment. Object to it, if your Honor please, upon all of the grounds previously stated; and upon the ground that the revenue derived in this district is of no possible aid to the court in fixing either damages or profits. If all the revenue from all over the country or all over the world is brought in—

The Court: I am having difficulty in following you, Mr. Knupp.

Mr. Knupp: My only purpose in this, if the court please, is to show that this picture returned less revenue and was distributed in fewer theatres than apparently any picture that Universal exhibited during that same year.

(Testimony of Foster Blake)

The Court: I know, but you have already entered into a stipulation of the number of theatres that it has been displayed in.

Mr. Knupp: That is right. But the court has no information as yet as to how many theatres the Class A better pictures are displayed in; and that is the only purpose of this evidence, to give the court a comparative view of those two features. I wanted to show to the court that this picture was distributed in fewer theatres or comparatively [286] fewer theatres than any other picture, and that it was distributed in fewer theatres than the better pictures of Universal were during the same year or during the same time, as indicating the lack of possible effect upon the re-issue or re-make rights of the Lloyd picture.

Mr. Fendler: Unless we had a complete picture, it would be of no value, your Honor.

The Court: Does this cover just this district?

Mr. Knupp: It covers just this district, if the court please. But I understood yesterday that Mr. Fendler was contending that this was an average district. I don't know whether—

The Court: I had not heard that.

Mr. Knupp: I am perfectly frank to say to the court that this witness won't know whether the same ratio of distribution existed in other distribution districts as in this.

The Court: Gentlemen, I have in mind that I want evidence, if you cannot stipulate to it, on the extent to which the Columbia picture was exhibited or was distributed.

(Testimony of Foster Blake)

Mr. Knupp: Yes. That is what we are trying to ascertain now, if the court please.

The Court: What is that.

Mr. Knupp: That is what we are trying to ascertain this morning. I think we will have it this afternoon.

The Court: I am going to admit this evidence for what [287] it is worth. I don't know whether it is worth anything or not.

Mr. Knupp: What was the question?

(Record read by the reporter.)

Q. How much revenue did this picture return, Mr. Blake? Will you determine that from your records?

A. This picture returned $9160.00 in this territory.

The Court: Over what period of time?

The Witness: From the date it was released until it was taken from service.

Q. By Mr. Knupp: What was the date of release?

A. December, 1943.

Q. That was the date of first release?

A. Yes, sir.

Q. And what was the date when you say it was taken from circulation? A. April of this year.

Q. Will you state from your record what was the greatest amount of revenue returned by any picture that you circulated?

Mr. Fendler: Objected to as immaterial; it is outside of the issues in this case. There is no question about this picture being a B picture, and obviously A pictures return more money. It cannot be of any help to the court in determining profits or damages. [288]

(Testimony of Foster Blake)

The Court: In how many theatres was this picture displayed?

The Witness: In how many theatres was So's Your Uncle displayed? According to this record, 241 theatres, at a slight variance with the figure that I got from our own local records. This is from the home office.

Q. By Mr. Knupp: What about the Class A pictures or other pictures that were distributed by you?

The Court: Counsel, I think the objection to that is good. Whether it has produced anything or not would not determine anything. The damage, if any, sustained by Lloyd would be the extent to which the public saw this picture So's Your Uncle. It might have been furnished free along with the purchase of some other picture or something of that type.

Mr. Knupp: That is correct. I was asking the witness now the number of theatres in which these other pictures were exhibited so that the court would have some standard of comparison.

The Court: Can you answer that, Mr. Blake?

A. Yes, sir. A picture released right at the same time, which was an A picture, played in 481 theatres; in fact, it is the same picture with which So's Your Uncle played Los Angeles as the B picture, the second picture.

Q. By Mr. Knupp: What was that other picture?

A. His Butler's Sister. [289]

Q. How many weeks did that play in Los Angeles?

A. Three weeks first run in the Hillstreet and Pantages theatres.

(Testimony of Foster Blake)

Q. Out of those three weeks how many weeks did So's Your Uncle play?

A. So's Your Uncle was the second picture during the second week of that engagement.

Q. I show you this printed matter, Mr. Blake, and will ask you if you will identify that?

A. That is known as a press book and it happened to be a press book covering the picture So's Your Uncle.

Q. Just what is a press book?

A. A press book is issued to assist the theatre men in advertising, exploiting, selling the picture to the public. It contains material to plant with the newspapers; it contains pictures of the advertising material, both newspaper ads and posters; and the theatre men can order the advertising material from this catalog.

Q. And it contains such material, I assume, as you think is best indicated to produce the best box office results? A. That is right.

Q. That is what it is intended for, is it not, Mr. Blake, to induce the public to come to the box office to see this particular show?

A. Yes, sir. It outlines the studio suggestions that [290] are to sell your picture.

Q. Is this the complete press book?

A. This is complete and entire.

Mr. Knupp: We will offer this into evidence, if the court please, as our next exhibit in order.

Mr. Fendler: Objected to as incompetent, irrelevant and immaterial, and outside of the issues in this case.

The Court: Objection overruled; admitted.

The Clerk: Defendants' Exhibit F.

(Testimony of Foster Blake)

Q. By Mr. Knupp: Mr. Blake, did you see the plaintiff's picture Movie Crazy? A. Yes, sir.

Q. And you have seen the defendant Universal Picture Company's picture So's Your Uncle?

A. Yes, sir.

Q. Have you an opinion as to the re-issue value of the plaintiff's picture?

The Court: Counsel, there is nothing to show that this man has any qualifications in that respect.

Mr. Knupp: He is an executive, if the court please, engaged in the business of selling motion pictures. He knows what it takes to sell a motion picture.

The Court: All right; I will listen, but I want to say frankly that unless more facts develop, I might as well testify myself to what I think is the value. [291]

Mr. Knupp: I beg pardon, your Honor?

The Court: I say, anybody might testify to that as far as its weight is concerned. You may proceed.

Q. By Mr. Knupp: Did you testify, Mr. Blake, about how long you had been in this business of selling motion pictures?

A. I have been selling motion pictures for 18 years.

Q. And you have been doing that work exclusively?

A. Yes, sir.

Q. And when you say you have been selling motion pictures you mean you have had to go out actually to the exhibitors and sell them? A. That is right.

Q. Point out the features of the pictures that you thought would sell? A. That is right.

Q. Have you dealt with any re-issue sales?

A. Yes, sir.

(Testimony of Foster Blake)

Q. Have you an opinion as to the re-issue value of this particular picture of plaintiff's?

Mr. Fendler: Just a moment, if your Honor please. I desire to examine the witness on voir dire. I object for the purpose of the question on the ground that no proper foundation has been laid.

The Court: You can develop that on cross examination, Mr. [292] Fendler.

Mr. Fendler: I beg your pardon?

The Court: I say, the weight to be given to this witness' testimony is for the court, and I will permit you to develop it on cross examination.

Mr. Fendler: Very well.

Mr. Knupp: Did the witness answer the question?

The Reporter: No.

(Question read by the reporter.)

Q. By Mr. Knupp (Continuing): Entitled Movie Crazy? A. I have my own opinion, yes, sir.

The Court: Just a moment. Have you ever had anything to do with the sale of pictures, for instance, like where Harold Lloyd owned this picture and the sale of it to another studio?

A. No, sir. I am only selling pictures to theatres.

The Court: Then you would not know anything about the actual value of what your company might view as the value of that picture in buying it or in the sale of one of its own films, would you?

The Witness: That is probably right, excepting that I am under the impression that the value that can be obtained from the theatres has a lot to do with the amount that a company would pay for the re-sale or re-issue rights of the picture. [293]

(Testimony of Foster Blake)

The Court: In other words, all you are testifying to is as to whether there would be a demand from the public, which, of course, is a matter that induces the producer to buy a picture.

The Witness: That is right.

Mr. Knupp: Will you read the last question?

(Last previous question and answer read by the reporter.)

Q. And what is that opinion?

A. I don't believe that the re-issue of Movie Crazy at this time would be particularly profitable. I don't say "profitable". What I mean is that it would not sell particularly well.

Q. Well, you say "not particularly well." Do you have any idea about what value might attach to the re-issue rights?

Mr. Fendler: I beg your pardon: Just a moment.

The Court: Counsel, he has testified that he does not know what the re-issue rights are. On account of his testimony, all that he could testify to, as I understand the testimony, is that he, in his opinion, does not feel that it would be salable to the theatres in his particular district.

The Witness: Right.

Mr. Knupp: Well, I think, if the court please, that is the one thing that would determine the question of re-issue rights, as to whether or not the man who bought the re-issue rights could sell the picture on re-issue to theatres. [294]

The Court: Well, anybody who saw So's Your Uncle and then says that Movie Crazy hasn't any real sales value, I am interested in his testimony.

(Testimony of Foster Blake)

Q. By Mr. Knupp: Mr. Blake, do you have an opinion as to whether such sales value as the picture Movie Crazy might have has been in any way affected by the production and exhibition of the defendant Universal Company's motion picture entitled So's Your Uncle?

Mr. Fendler: Objected to upon the ground the witness is not qualified to answer.

The Court: I don't see any qualification.

Mr. Knupp: The question is—

The Court: However, gentlemen, I am going to admit this testimony. There is a conflict in theories and I am going to admit the testimony. If Mr. Fendler's theory of the damages is correct, I am the one who has to fix the damages. And we have the usual situation here where somebody says: "I stole your house but it wasn't worth anything, anyhow, so you haven't been damaged." And the other fellow says: "Well, the house is worth"— or testifies that, "in my opinion it is worth a good deal more than it would cost to replace it or its value." And it is going to be the responsibility of the court to arrive at some figure, if his theory of establishing the damages is correct.

I am willing to listen to all the testimony that you [295] have, if we have to stay here until ten o'clock at night to listen to it.

I want to say that it is rather surprising to the court to hear somebody come in here and say something is worth $400,000 and the other fellow comes in on the other side and says it is not worth anything. I am looking for some witness who can approach the matter in what I think a more sensible manner than either side has.

(Testimony of Foster Blake)

Mr. Knupp: Do we have a question pending, Mr. Reporter?

(Question read by the reporter.)

A. I don't think it has—

Mr. Knupp: Just answer yes or no, Mr. Blake.

A. Yes, or I do not think it has been damaged, sir.

Q. And for what reason?

Mr. Fendler: We object to that and ask the objection to be deemed interposed before the previous answer.

The Court: Objection overruled.

Mr. Fendler: Specifically, that this is an invasion of the province of the court as to the question of damage. I want to make—

The Court: You are raising the same objection that the other parties had.

Mr. Fendler: No, sir.

The Court: Just a moment. I have ruled.

The Witness: May I have the question? [296]

Q. By Mr. Knupp: Will you state your reasons for your last answer, Mr. Blake?

A. The elements that we deal in, the values to sell a motion picture are star value and that sort of thing. I do not believe that the sequence in question has anything importantly to do with the sale of that picture Movie Crazy.

Q. Had you finished that explanation, Mr. Blake?

A. Yes, sir. If the picture were re-issued—well, I haven't, either. If the picture were re-issued, I believe that, naturally, it would be sold as a Harold Lloyd picture, and I believe it would sell just as well or just as badly regardless of So's Your Uncle.

(Testimony of Foster Blake)

Q. Have you an opinion, Mr. Blake, as to what proportion of the profits earned by So's Your Uncle may have been contributed or may be charged or attributable to this particular sequence?

Mr. Fendler: Now, just a minute.

Q. By Mr. Knupp: Involving the magician's coat?

Mr. Fendler: Now, if your Honor please, we are getting into the precise question I understood your Honor excluded. That was the reason I made this motion this morning.

The Court: Counsel, it is hard to be consistent with counsel themselves not being consistent, and I am not certain that my rulings have been consistent. If they had been throughout this case I would be surprised. [297]

Mr. Fendler: In this particular instance we object to the question as asking this witness to allocate what proportion of the profits of a picture is due to a certain sequence. Now, that is the question which I understood your Honor was going to refer to a master. In any event we object to it.

The Court: No, I am not going to refer that to a master because that is the element of damages. That is the question for the court to pass upon, after we determine the profits—what proportion, if any, that the plaintiff is entitled to recover. The general rule on these cases has been 20 percent.

Mr. Fendler: If your Honor please, your Honor is talking about "profits." I am talking about damages. Profits are not a measure of the damages. Now, I understood your Honor to say that you were going to hear testimony—

The Court: I am.

(Testimony of Foster Blake)

Mr. Fendler: —on damages, but you were not going to hear testimony about profits.

The Court: I am not.

Mr. Fendler: If there was a question about profits, that was going to be referred to a master.

The Court: The question of profits is going to be referred to a master.

Mr. Fendler: This witness is being asked to allocate— [298] in fact, he is being asked to allocate what proportion of the profits are attributable to this sequence.

The Court: Mr. Fendler, let him answer the question. It is easier to let him answer the question than to argue with you gentlemen. It is going into the record and if it comes to a question of profits it is going to be referred to a master, anyhow.

Mr. Fendler: I can be hung by the thing that goes in.

The Court: Now, you can't be hung, because I want to say right now as far as this witness' testimony, with his qualifications, that his testimony has practically no weight as to the issues involved and I am just listening.

Mr. Knupp: Would you read the last question?

(Last question read by the reporter.)

A. I do not believe I am qualified to answer that.

Mr. Knupp: That is all.

The Court: I do not care to hear any cross examination, Mr. Fendler, of this witness.

Mr. Fendler: Very well, sir.

Mr. Knupp: That is all, Mr. Blake.

The Court: Gentlemen, I am interested, insofar as expert testimony is concerned, in that of these men that deal in these pictures and who actually have the handling

of them, either the brokers or the officials of the company who actually have the handling of the sale of films, older films [299] that are being re-issued or revamped. That is the kind of testimony that I am interested in—in something that will have some weight with me.

That is no reflection on this witness. I do not mean that. But I just do not feel that his testimony helps me and I am asking for help.

Mr. Knupp: I thought, if the court please, that a man who was actually engaged in the sale of pictures to theatres would be the best informed man on earth as to what the value of these re-issue rights were or what he could get when he sold these pictures. I think the rest of this testimony may be theoretical, but I think a man who has actually engaged from day to day in the sale of pictures is the man who actually knows best what he can sell.

The Court: I would not expect anybody connected with the defendant corporation to admit that there had been any damage at all; I would not expect them to. But I have been interested in testimony of people who are engaged in this particular business who can be of some aid to the court.

Mr. Knupp: Well, your Honor, that is what I thought this witness would be. That is the reason he was produced.

Mr. Fendler: If your Honor please, we desire to cross examine Mr. Blake on some matters which we feel are very pertinent, which were brought out on direct examination.

The Court: All right. I denied you that privilege. [300] The witness will be recalled for the purpose of cross examination. I thought when I—

Mr. Fendler: No, not on the expert testimony. I am going into some of the other matters that he testified to.

Mr. Knupp: I think, if the court please—might I say just one thing? I think in connection with this whole question of damages we are in much the same situation as the plaintiff is here. I do not think that either party was really prepared on this question of damages, because we assumed that it would not be gone into on this hearing. I do not think that either of us has really had a fair opportunity to produce the sort of expert testimony that we could if we had known in advance that the court was going to take evidence on that particular question. We are just in exactly the same position that the plaintiff is in that regard.

After all, it is a question of getting these people together and getting them to see these pictures; and when we only find out at the last moment that evidence of that character will be heard, it is very difficult for us to secure the kind of evidence that we should like to present to the court.

The Court: I will say this: That the court is not going to deprive either side of having their full day in court. If you feel that you are not prepared to answer this issue, all right. I understood from the first of the week [301] that you were prepared to go on with this issue, except the question of accounting.

Mr. Knupp: Both the questions of damages and accounting, if the court please.

The Court: In other words, you understand, the court wants all the evidence that it can get which may help it to arrive at a fair conclusion on this element of damages. While I am not making any final decision in the matter until you gentlemen have had an opportunity to brief the matter, my present state of mind is that there is liability here and that that liability, under the evidence, covers such a range that it is presenting a very difficult problem to the court, and the court would like the aid of those who can help it.

I realize that you gentlemen are at a disadvantage, and I am also at a disadvantage because I am not well informed as to the industry involved. I am not familiar with this question of the re-makes and the re-issues, etc., and there are those in the industry who are and who should be able to give the court real aid.

The only witness, so far, that I can recall at this moment who has had a broad comprehension of the industry is Mr. Lloyd himself. I realize that he is the plaintiff and an interested party, and these employees of Universal are virtually in the same position.

If there is such a thing as disinterested witnesses in [302] the industry, that we do not feel they are bound one way or the other but can give the court their frank, honest testimony on the questions of the re-issues and the practice in that regard, and the re-makes and the practice, and the salability of films that have been out for ten years and have been in cold storage since then, I would like to have that aid. I know as a matter of common knowledge that these films are retained and are considered valuable to producers. They do not know when they may use them or some parts of them again. I know

that it is their stock in trade like a lawyer's library, in a way.

Mr. Knupp: That is exactly our position, if the court pleases. We cannot, of course, expect anybody to testify in connection with this matter except those who have seen the picture; and we have had difficulty, in the very short time we have had, in getting the people that we should like to have gotten to have seen the picture and also come in and testify at this time. So I do not think that either side is going to make a fair representation on that essential question of damages on the testimony that either of us has at hand at this time, if the court please. I am perfectly frank in that.

Mr. Fendler: I think, your Honor, that is the reason for the motion which I made this morning, that the matter of liability be determined first and then your Honor refer the entire matter to a special master, under your supervision and [303] guidance and so on.

The Court: Counsel, I never have been happy with the findings of a special master on the question of damages which are more or less intangible in a way.

Mr. Fendler: I was going to say this, your Honor—

The Court: I prefer to hear that evidence myself, and I will refer the matter of accounting to a special master.

Mr. Fendler: All right. Will your Honor hear my suggestion? There are in the city very outstanding motion picture lawyers: Loyd Wright, Neil McCarthy, former Judge Pacht has had considerable motion picture experience, Henry Herzbrun, former resident counsel of Paramount. Now, I am just making this suggestion in the desire to try and get the fairest picture before whoever is going to hear it. If it is agreeable to the

court, and counsel want to select any of the people that I have suggested, or any other men in the town who have written books on moving picture law, there are probably ten or twelve such men.

The Court: Mr. Fendler, I have made myself clear that on the question of the actual damage I am going to hear the evidence. As to the matter of accounting, when the time comes, I will refer it to Mr. Head as special master for that purpose.

Mr. Lewinson: May I be heard a moment, your Honor? Mr. Fendler has really made two suggestions. The first suggestion is that the issue of liability be heard first. Now, I think [304] Mr. Knupp and I are both in agreement that that suggestion is well taken and we acquiesce in it. The rest of the suggestion is not necessarily germane to the first part of it. I confess that until we came into court on Monday both Mr. Knupp and I were under the impression and had the definite understanding that only the issue of liability would be tried at this time. The result is that the preparation on the matter of damages has had to be—

The Court: I will settle that, gentlemen. I am going to hold there is liability.

Mr. Lewinson: You are going to hold before we have completed the case, your Honor?

The Court: The evidence I have heard up to this time, and so far all the evidence I have been hearing is on the question of damages. You have not offered any evidence on liability.

Mr. Lewinson: I thought I offered some and I expect to offer others.

The Court: Gentlemen, let us proceed.

Mr. Lewinson: Your Honor does not intend to have briefs on that subject?

The Court: I have read your briefs and I have given it considerable thought, and I do not believe that the law will justify the taking of a sequence the length of this out of one picture and inserting it into another picture; that the law is going to uphold that unless it is in the public domain. [305] And I just do not—

Mr. Lewinson: Of course, your Honor will decide the case, naturally, as you are advised, considering the law and the evidence. But if your Honor would—

The Court: I thought that we had gotten down to the point and the only thing that we were now offering evidence on is the question of damages.

Mr. Lewinson: We have other evidence on the question of liability. And if the course is followed that Mr. Fendler has suggested, that your Honor make an interlocutory judgment as to liability—which I hope you won't —after the argument we would like to have an opportunity of reviewing that so that that can be determined before vast expense is gone to on the question of developing evidence as to damages and accounting. But, again, that is in your Honor's hands. We can only suggest.

Mr. Knupp: I do not think, if the court please, that your Honor is going to get a very fair picture on this question of damages on the evidence that either side is going to be able to develop right now.

The Court: Then there is no occasion to proceed further on the element of damages, because I do not wish

to pass on that until I have had all the aid that both sides can give me. I want to try to be as fair to all parties as it is possible to be.

Mr. Abeles: Your Honor, as far as Universal is concerned [306] in appealing from the interlocutory decree, your Honor, we assume, probably would decide on the question of liability, depending, of course, on the future evidence. At the same time, we would like to take up the question, which we believe is quite settled, that there cannot be damages in an action of this nature. In other words, there can't be damages with the type of testimony of the plaintiff. If you have determined that you can decide a case of this nature on this type of evidence of damages, I would like to take that up at the same time.

The Court: The court wants to pass on it and wants to find out if it is true, for instance, assuming for the sake of argument that the plaintiff's contention is correct, that the film had a resale value, a re-issue value or a re-make value before this picture So's Your Uncle was released and that by reason of that release those riights have been destroyed. If that is not the measure of damages, then perhaps the Ninth Circuit will give us a rule to follow. I am inclined to feel that that is the rule of damages; it is the usual rule, that if we have been injured: What it was worth before and what it was worth after the injury, and the only way we can get that is through experts.

Mr. Abeles: Not on copyrighted property, Judge. It has never been done. The only case in which it has ever been done is the one I pointed out and— [307]

The Court: Gentlemen, it is going to be done in this case.

Mr. Abeles: You see, Judge, what I have reference to—don't misunderstand me saying this—we are going to appeal from the interlocutory decree. I would like to take up the damages at the same time.

The Court: I am going to decide the case all at once. I am going to have the whole thing so that we can have that whole picture and all of you can spend all the money you want on it.

Mr. Abeles: We need perhaps a couple of days for both sides.

Mr. Fendler: I have one rebuttal witness who will take ten minutes. That is the only additional testimony I am going to have.

The Court: Gentlemen, if it goes over it will have to go over until December.

Mr. Lewinson: I think we should have time, your Honor, to develop the testimony in a workmanlike way and, if I may say so, a lawyer-like way on the issue of damages.

The Court: Well, I think so, and I will be glad, in the meantime, to have that question briefed.

Mr. Lewinson: All right. And we have additional testimony on liability, your Honor.

The Court: Then we will take that up at two o'clock, [308] gentlemen. We will adjourn at this time until two o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p. m. of the same day.) [309]

Los Angeles, California, Thursday, September 13, 1945
2:00 P. M.

Afternoon Session.

Mr. Fendler: If your Honor please, Mr. Landau has returned but Mr. Knupp has informed me that they do not have the national distribution figures on the Columbia picture; so I wonder if Mr. Landau may be placed on call?

The Court: As I understood this morning, we were going to have to continue this matter for the purpose of getting expert testimony, and under those circumstances I think that the witness should be excused until further notice.

Mr. Fendler: Thank you.

Mr. Lewinson: May we proceed, then, your Honor?

The Court: Now you may proceed.

Mr. Lewinson: Mr. Larsen, will you please take the stand?

W. W. LARSEN,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: W. W. Larsen, L-a-r-s-e-n. [310]

Direct Examination.

By Mr. Lewinson:

Q. Mr. Larsen, you live in Los Angeles County?

A. Yes, sir.

Q. How long have you lived here?

A. About 22 years.

(Testimony of W. W. Larsen)

Q. You are a lawyer by profession and a member of the Los Angeles Bar? A. That is correct.

Q. You are not engaged in practice at the present time, however?

A. I have not been for several years.

Q. And you have not been for a number of years last past? A. No.

Q. You are also a magician, are you not?

A. That is correct.

Q. And have been for a number of years?

A. Right.

Q. You supply magicians' props to other magicians?

A. Yes, sir; we are in the manufacturing business.

Q. Prior to 1932 did you know the conditions attached to magicians' performances, with special reference to whether there had been any change from the early acts that magicians gave? [311]

A. Do you mean change?

Q. Well, in other words, prior to 1932 had magicians' acts been combined with comedy routines in night clubs and hotels and on the stage? A. Yes, sir.

Q. The questions I am going to ask you now all relate to conditions prior to 1932, so I won't repeat the date each time. Did you know of an act in which a person who was not a magician was in a magician's coat and attempted to perform magician's tricks and stage business prior to 1932?

A. Yes, sir; all too many times.

Q. In that act did birds and other magician's props come out of the coats?

(Testimony of W. W. Larsen)

Mr. Fendler: Now, just a minute, if your Honor please. I object to the line of questioning as leading and suggestive.

Mr. Lewinson: It is leading. I will withdraw the question and re-state the matter. Of course, I have to attract the witness' attention to the matter.

Q. State whether or not in connection with those acts anything in the nature of magician's props appeared to come out of the magician's coat accidentally?

A. Yes, sir.

Q. And what magician's props appeared to come out of the coat accidentally?

A. Well, ever since I can remember it has been a favored [312] subject for cartoons. Rabbits, doves, billiard balls, flags, cards, eggs drop out of a magician's coat, and particularly of his vest.

Q. State whether or not that applied to the case of the magician wearing the oversized coat or the would-be magician wearing the oversized coat?

A. In comedy, yes.

Q. Prior to 1932 did you also know of any egg and chicken acts?

A. Yes, sir. That goes back before my time. It is the Gannon-Kelley act.

Q. Just briefly, what kind of an act was that with reference to dropping an egg?

A. Usually it is breaking it and the chicken comes out instead of the usual yolk content; and also it is the taking of dozens of chickens out of people's pockets and out of their hats and handkerchiefs.

(Testimony of W. W. Larsen)

Q. Prior to 1932 did you also know of an act which involved rabbits or a rabbit and serving tray?

A. I knew Max Molini very well, starting about the year 1936, and he and others frequently told me of his exploits with the rabbit and a serving cover.

Q. Did you know prior to 1932 of any reputation of general knowledge in the magicians' profession with reference to the dropping of a rabbit upon a serving tray? [313]

A. It is not exactly the dropping of a rabbit on a serving tray.

Q. Will you tell us what it is?

A. It is the secret introduction of a rabbit beneath a serving cover.

Q. Oh, I see. Did you know that prior to 1932?

A. Oh, I have done that myself for 20 years.

Mr. Lewinson: Yes. You may take the witness.

Cross-Examination.

By Mr. Fendler:

Q. What was the occasion when you secreted a rabbit—

The Court: Just a moment. I want to ask the witness a question. Did you ever see this picture Movie Crazy?

The Witness: No, sir.

The Court: Did you ever see So's Your Uncle?

The Witness: No, sir.

The Court: Did you ever see the magician's coat sequence in a picture?

The Witness: No, sir.

(Testimony of W. W. Larsen)

The Court: The magician accidentally getting, or a person in good faith getting into a magician's coat and having those things crawl out of it?

The Witness: In pictures?

The Court: I say, in any circumstances? [314]

The Witness: I have never seen a movie, your Honor.

The Court: All you have seen is where a magician has been plying his art, have you not?

The Witness: Your Honor, it is a favored subject for cartoons and articles. I have seen that since I was a boy, of the person who does not know magic getting into the magician's coat and things start to happen.

The Court: You may proceed.

Q. By Mr. Fendler: Where did you see that?

A. I have seen it in cartoons ever since I became interested in magic. I have also read magazine articles where it is a favored subject, stories.

Q. How many cartoons in sequence have you seen where a person gets into a magician's coat by mistake?

A. I have not seen things in sequence; just isolated cartoons.

Q. You have seen an isolated cartoon where someone got into a magician's coat by mistake?

A. That I won't say.

Q. In other words, you have seen a cartoon where somebody was in a magician's coat?

A. Someone who is not a magician wearing a magician's coat.

Q. How they got into it you don't know?

A. I don't know. [315]

Q. What happened except for that single cartoon you don't know? A. I don't know.

(Testimony of W. W. Larsen)

Q. Did you perform, yourself, on the vaudeville stage?

A. I performed in hotels west of the Mississippi River.

Q. When you put on a magician's coat it was legitimate, is that correct?

A. I do not wear a magician's coat. They exist only in the figment of popular imagination.

Q. A magician has to wear something, doesn't he, that he secretes the props in?

A. Only according to popular opinion.

Q. Well, the whole theory of a magician's coat is, then, not factual at all, is that right?

A. It was factual about the year 1874, when the first book of magic was written.

Q. But currently and for the past 25 or 30 years, while you have been doing business, the magician's coat is entirely fictional? A. That is right.

The Court: What kind of coat do you wear?

The Witness: Well, your Honor, last night I performed in the same suit I have on now.

The Court: Well, you had a coat on, didn't you?

The Witness: Yes. I mean you can call it a magician's [316] coat if it belongs to a magician, but there is no secret pocket.

Q. By Mr. Fendler: Are you a member of any magical society?

A. Yes, sir; I am a member of all of them.

Q. Will you name them?

A. The Society of American Magicians; International Brotherhood of Magicians; the Pacific Coast Association of Magicians. I could keep on. Do you want me to?

(Testimony of W. W. Larsen)

Q. That is a representative group that you selected?

A. Yes, sir.

Q. Are you aware of the fact that Harold Lloyd is a member of one or more of those magical societies?

A. Yes, sir. We have attended meetings together frequently.

Q. Have you seen Harold perform magical tricks?

The Court: Well, we are not interested in whether he performs those tricks or not, magician's tricks.

Q. By Mr. Fendler: I am interested in this secretion of the rabbit in the tray. Will you describe what you have done before audiences in secreting rabbits under a cover on a platter?

A. Yes, sir. It is not a tray; it is a cover. I do it with either a cover or a hat. [317]

Q. Now, describe what you do.

A. This is not in my regular program. This is when I am working at fiestas in hotels.

Q. All right.

A. I will go up to a table and with a deck of cards get one party to select out a card. It is placed face down. Then I will either take a cover or a hat and place it over the card. I tell them that if they will think of another card, the card down here will change into the card they think of. I lift it and sometimes that part of the trick works and sometimes it doesn't. Then you close it in an effort to make another attempt, lift again, and there is a rabbit.

Q. Do you usually use a drunk at a table to try that trick with?

A. I have performed before lots of drunks.

(Testimony of W. W. Larsen)

Q. I mean do you usually try and select a drunk for a trick like that?

A. Well, it is fun to work with a drunk.

Q. Have you ever handed a drunk a raw egg when he was trying to knock a fly on his forehead?

A. No, sir.

Q. And seen him take the egg and smash it over his forehead? A. No, sir.

Q. In trying to get the fly? [318] A. No.

Q. Does that sound to you like original comedy?

A. It doesn't sound like a magician's trick.

Mr. Fendler: All right. Oh, I think that is all.

Redirect Examination.

By Mr. Abeles:

Q. Just one or two questions so I know what we are talking about. In the act you have mentioned where a man has an oversized magician's coat—correct me if I am wrong—is that the act where a magician is working legitimately and he has a stooge work with him and through some source or other this fellow gets into a coat that does not belong to him; he has a big, oversized magician's coat; and they are working on the stage; is that the idea?

A. The act of King and his partner used to work that way.

Q. And then the stooge upsets the magician; that is, everything that the magician does the stooge makes comedy of and he knocks his routine.

A. I have seen a number where the stooge comes out of the audience and then begins to upset the magician.

(Testimony of W. W. Larsen)

Q. The stooge comes out of the audience onto the stage, gets hold of the magician's coat, and eventually out of the stooge's coat the sausage comes out, or whatever it may be? [319] A. That is right.

Q. Out of the stooge's coat the sausage starts coming out, birds start coming out, rabbits start coming out, and the whole audience starts laughing because he is imitating the magician's act and giving it away?

A. That is right.

Q. You told me you saw Max Molini work a number. I saw him in Paris and also in New York. Do you remember the act he had where he worked with a stooge waiter; he is dancing around and then a rabbit comes out of his clothes and the waiter is passing and he puts it on the tray?

A. As I first explained to you, I only knew Molini after 1936, but he lived with me for awhile and he told me—

Mr. Fendler: Just a minute. Object to that as heresay.

The Court: We are not interested in what he told you.

Q. By Mr. Abeles: You have heard that he does that trick, haven't you?

The Court: Just a moment. I have ruled that that is hearsay.

Mr. Abeles: All right; that is all.

Mr. Fendler: Nothing further.

Mr. Lewinson: That is all, thank you.

The Court: May he be excused?

Mr. Lewinson: Yes.

Mr. Adler, will you please take the stand? [320]

FELIX ADLER,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Felix Adler, A-d-l-e-r.

Direct Examination.

By Mr. Lewinson:

Q. Your name is Felix Adler? A. Yes, sir.

Q. You reside in Los Angeles County?

A. Yes, sir.

Q. At present you are employed by Columbia Pictures Corporation? A. Yes, sir.

Q. You have had prior employment in the movie industry? A. I have.

Q. You were employed by the Harold Lloyd Corporation when Welcome Danger was being made?

A. I was.

Q. And when Movie Crazy was being made?

A. Yes.

Q. Prior to going into the movie industry you were in [321] vaudeville? A. I was.

Q. And you were also in burlesque at one time?

A. I was.

Q. How long an experience have you had in the entertainment field, including burlesque, vaudeville and in connection with the picture industry?

A. Forty-five years.

Q. In what capacity were you employed by Harold Lloyd in Welcome Danger?

A. As a writer or gag man, as you want to call it.

(Testimony of Felix Adler)

Q. State whether or not you suggested the routine in Welcome Danger which started with Lloyd getting into the magician's coat by mistake.

A. In what way do you want me to tell you?

Q. Was the comic routine in connection with the magician's coat suggested by you or by someone else when it was first made for Welcome Danger?

Mr. Fendler: Just a minute. We object to the form of the question.

Mr. Lewinson: I think the question is proper.

Mr. Fendler: I don't know what is implied by "the comic routine." I don't know whether that is supposed to mean the magician's coat sequence—

Mr. Lewinson: I will withdraw the question. [322]

Mr. Fendler: —as it eventually appeared in the picture Movie Crazy; I don't know whether it was a conversation that took place or what.

The Court: He has not asked him that.

Mr. Lewinson: I have withdrawn the question.

The Court: Proceed.

Q. By Mr. Lewinson: Mr. Adler, I call your attention to the comic routine which appeared in Movie Crazy as it was released, which was made up, among other things, of certain gags and stage business, including an egg or eggs coming out of the magician's coat, birds coming out, mice coming out, the dropping of mice, and certain other things. Do you recall that?

A. I do.

Q. Do you recall that that was first made for Welcome Danger?

Mr. Fendler: Just a minute. We object to it, if your Honor please. Now counsel is leading and suggesting

(Testimony of Felix Adler)

answers to his own witness here. He is assuming facts not in evidence.

The Court: That is an admitted fact, counsel.

Mr. Lewinson: The facts are in evidence and these are preliminary questions.

Mr. Fendler: It is not in evidence, if your Honor please. [323]

The Court: Mr. Lloyd himself testified that that was originally planned to be in Welcome Danger.

Mr. Fendler: And in a different form.

The Court: I know, not in the same form, but the general idea.

Mr. Fendler: I don't know what they are talking about, your Honor, and I think we are entitled, for the purpose of clarity, to know just what the scenes and sequences are that the witness is going to say that he wrote or that other writers contributed.

Mr. Lewinson: I can't do it all in one question.

The Court: Objection overruled. You may answer the question.

The Witness: What was the question?

Mr. Lewinson: Read it, please?

(Question read by the reporter.)

A. The magician's coat sequence was.

Q. Can you explain to the court how it happened to be made for Welcome Danger?

A. I believe I can.

Q. Well, please do so.

A. We were working on the story of Welcome Danger, which starts out with a young fellow who has ambitions, whose father was formerly a police captain who was a great man in tracking down crime, and he had

(Testimony of Felix Adler)

passed away and there was a [324] crime wave going on in San Francisco and they were at a loss to fathom the crime. So somebody suggested: Like father, like son; get his son. And Lloyd was brought over there. And we went on and started doing the story and the surroundings were rather drab. So, looking over the rushes for a long time, he said, "We need some production value in this picture." So I think they put on a dance. He said, "We have got to have some fun in that," and I happened to suggest this. I said "Why don't you get into a magician's coat by mistake and let the fun take its course?"

Q. Can you explain whether there were any antecedents for that suggestion or whether the suggestion came out of your own head without antecedents?

A. Well, years ago I saw a magic act in vaudeville, having played in vaudeville myself, by the name of Martini and Maximillian and Martini was the straight magician and Maximillian was a sort of stooge. And after Martini had done a trick he would hand the prop or something like that to Maximillian and he would give the trick away. And in the course of this he had a suit on and, as he walked away, things used to drop out of his coat.

Then later, I saw Charlie Chaplin in a picture and in this picture Chaplin was an escaped convict and got into a minister's studio. He met a girl and fell in love with her. In the meantime another convict escaped and he insisted upon [325] coming to the house. This Chaplin was trying to reform the other convict and the other convict was trying to steal stuff. So at the table he started taking things and Chaplin would put them back. When Chaplin's back was turned, nearly all the silverware was gone from the table, so Chaplin suspected the other convict

(Testimony of Felix Adler)

had stolen them. So he picked up some object, either the knife or fork or spoon, and did some trick with it and made a couple of passes as if he were a magician, and stuck his hand in the other convict's pocket and brought out a lot of silverware and put it back on the table.

After seeing that and the other thing I explained about Maximillian, those things gave me two ideas and I thought it might be a good idea at the time I saw that in the Chaplin picture, and that that might be a good idea to keep; that we could get something out of it. So when the picture was made I happened to suggest we could get something out of it.

The Court: The sequence was original with you?

The Witness: Those two ideas led up to the subject matter.

The Court: Any idea is based upon that of somebody else that you have known?

The Witness: I always thought so.

Q. By Mr. Lewinson: Had you ever prior to 1932, or prior to 1928 for that matter, the date of the making of Welcome Danger, seen on the stage acts in which a person or [326] persons changed into other people's clothes? A. Yes, sir.

Q. Can you mention any celebrated comedy that appeared prior to 1928 in which that occurred?

The Court: Where he put on somebody else's coat?

Mr. Lewinson: Yes.

A. Edmond Hayes in The Wise Guy. A vaudeville act afterwards played a similar scene.

(Testimony of Felix Adler)

Q. Would "Charlie's Aunt" be another illustration?

A. Oh, yes. Charlie's Aunt is a well-known farce, where he puts on the costume and masquerades as the aunt.

Q. Referring to some of the stage business in Movie Crazy, and calling your particular attention to the stage business with reference to the fly on the head of the drunken person and an egg being dropped in his hand and then being smashed on the head to knock the fly, prior to 1932, or for that matter, prior to 1928, had you seen anything similar to that in the pictures?.

A. Oh, many times.

Q. Can you give one instance?

A. Yes. I remember a two-reeler Mack Sennett made on the old lot on Glendale Boulevard. We had a comedian called "Fat Roebeck." He was sleeping under a tree and the mosquitoes were bothering him, and above him in the crotch of a tree there was a chicken laid an egg and it fell in his [327] open hand. As the mosquitoes were bothering him an egg dropped and he took up the egg and slapped himself in the face and the egg broke in his face.

Q. With reference to the comic business with the knives and forks in the woman's garter as it appeared in Movie Crazy, did you suggest that?

A. I did.

Q. Was there any antecedent to that?

A. Oh, yes.

Q. What was it?

A. There was an old story with a Jewish dialect about it. I won't attempt to go into any dialect. But anyhow, a fellow comes back from a party with his

(Testimony of Felix Adler)

friend and as his friend puts his hand in his pocket he pulls out a lot of knives and forks he collects at his friend's house. The friend says, "Please forgive me. I only did it for a joke." And the fellow replies, "I know, but there was some spoons there, too."

Q. Was that where you got the idea?

A. I got the idea, and also the young lady that played in the part, because I was going with her at the time. I afterwards married her, to my sorrow.

Q. She was the one who took the part?

A. She was the one who took the part.

Q. With reference to the stage business in Movie [328] Crazy which involves the squirting of the water through a flower and then the woman picking up a glass of water and throwing it at the wrong person—do you have that in mind?

A. Oh, yes. We did that at Fox, the old Fox, not Twentieth-Century Fox.

Q. With these knives and forks, this comedy you refer to was prior to 1928, was it not?

A. The knives and forks?

Q. Yes.

A. That is one of the oldest vaudeville monologues.

Q. It was before 1928? A. Oh, yes.

Q. With reference to this water trick that we have referred to, when did you see that and with whom?

A. We have done the water trick coming out of the flower time and time again. At Sennetts', probably nearly every other picture we made, and as far as the "Topper" to it, as we call the "Topper"—

(Testimony of Felix Adler)

Q. That is throwing the water at the wrong person?

A. Well, where the person think somebody holding a glass of water is doing it. We did that at Fox, Benny Stoloff.

Q. Was that prior to 1928?

A. Well, I worked with Fox before I went with Lloyd. Benny Stoloff directed a two-reeler. He is still directing [329] around here, and he made that.

Q. Generally, as to the other pieces of stage business that appear in Movie Crazy, had you seen them before?

The Court: I understand he tells me he has never seen it.

Mr. Lewinson: Oh, I beg your pardon.

The Court: Didn't you say you had never seen the picture Movie Crazy?

Mr. Lewinson: He said he worked on it.

The Court: I mean the picture itself.

The Witness: That I never saw it?

The Court: Did you see the picture?

The Witness: Oh, yes; I saw it in the projection room.

The Court: All right.

The Witness: I worked on the story.

The Court: I know, but I understood you to say that. I was thinking probably about that deposition I just read.

Mr. Lewinson: Maybe so, your Honor.

Q. Now referring to the other stage business in Movie Crazy such, for example, as the string of handkerchiefs that appears, do you recall that coming out of the magician's coat?

A. Just how—I didn't quite understand.

(Testimony of Felix Adler)

Q. Let me put it this way: Prior to 1928 had you ever seen a string of handkerchiefs or anything like that coming out of a magician's coat? [330]

A. Oh, that is a standard trick.

Q. Had you ever seen rabbits? A. Yes.

Q. Pigeons? A. Yes.

Q. Eggs? A. Yes.

Q. Mice? A. Yes. Mice, ducks, geese.

The Court: In that Movie Crazy picture that you worked on, that sequence with the magician's coat, you did not consider that the man there was playing the part of a magician, did you?

The Witness: You mean Harold?

The Court: Yes.

The Witness: No.

The Court: So that he was not the magician making things appear, but it was just because they happened to be in that coat?

The Witness: That is right.

The Court: And he found himself embarrassed by reason of it?

The Witness: Yes, sir.

Q. By Mr. Lewinson: Mr. Adler, do you recall a motion picture Small Town Idol? [331] A. Yes.

Q. Was that made prior to 1928? A. Oh, yes.

Q. By whom was it made? A. Mack Sennett.

Q. What was the theme or idea of that picture, generally?

A. The idea of a country bumpkin trying to crash Hollywood and becoming a success in pictures.

Q. Was that a full-length picture?

A. It was a feature-length.

(Testimony of Felix Adler)

Q. Do you know of any picture in which a person gets a screen test by sending the wrong photograph to the studio? A. Yes.

Q. That was prior to 1928? A. Yes.

Q. What picture is that?

A. Mabel Normand in The Extra Girl, a feature-length by Mack Sennett.

Q. And that was made prior to 1928?

A. About '22 or '23.

Mr. Lewinson: You may take the witness.

Cross-Examination

By Mr. Fendler:

Q. You have been employed as a comedy writer or a gag [332] man for how many years, Mr. Adler?

A. Since about 1921.

Q. And for how many years were you employed by Harold Lloyd in that capacity?

A. Well, I don't know how long Welcome Danger ran, but Welcome Danger was first made as a silent and then we had to put sound in it. I think the engagement ran about 14 months on that one picture. And I thing Feet First ran about 10 months and then I worked maybe three months on something else. I kept getting less and less steady employment.

Q. And then did you work on Movie Crazy?

A. Yes.

Q. And did you work on any subsequent Harold Lloyd pictures?

A. Yes, sir; Cat's Paw and—I don't know what its name is—I believe after that I worked on that Milky Way, a part-time.

(Testimony of Felix Adler)

Q. You have worked for Lloyd over a period of ten years, more or less, is that correct? A. Yes.

Q. Did you work on The Freshman? A. No.

Q. You have mentioned a lot of things that you contributed to this magician's coat sequence. Did anybody else in the Lloyd organization contribute any suggestions or ideas [333] to the sequence in question?

A. I believe they did.

Q. And who else contributed?

A. Well, I don't know who was on the staff. Mr. Bruckman was on the staff.

Q. Lex Neal? A. Lex Neal.

Q. John Grey?

A. John Grey—I don't know if John Grey was on that picture or not.

Q. Did Vincent Lawrence have anything to do with it? A. Yes.

Q. In fact, Lawrence was given credit for writing the screen play, wasn't he? A. That is right.

Q. Al Boasberg?

A. No, I don't believe Boasberg was on it. He was not on it when I was on.

Q. Allen McNeill?

A. He was there before I came.

Q. Tim Whelan?

A. I don't believe he was on it.

Q. Agnes Johnson? A. I don't know her.

Q. Did Lloyd make any contributions to the magician's [334] coat sequence?

A. I never heard of one.

(Testimony of Felix Adler)

Q. You never heard of Lloyd making a contribution of any kind?

A. I don't believe I have ever heard him make any contribution of any kind on any of the stories. That is what he hired us for.

Q. Did he reject certain material and tell you what was wrong with it?

A. We would give him the stuff and if he didn't like it, he threw it out.

Q. Was material which was created by the writers there photographed and then sometimes re-photographed several times? A. Oh, yes.

Q. Why was it re-photographed?

A. I imagine the camera angle may have been wrong, or maybe he thought he didn't do it right or something like that.

Q. Do you think the timing of the comedy might have had anything to do with it?

A. Well, timing always has something to do with comedy.

Q. Timing is one of the most important elements in comedy, isn't it?

A. In the silent days, if you are just doing pantomime; but now, things are followed up.

Q. Movie Crazy is a talkie picture, isn't it? [335]

A. It is, yes.

Q. And the timing is still important, isn't it?

A. Well, it is not as important in that type of story as the gags are.

(Testimony of Felix Adler)

Q. You mentioned that the origin of this sequence was because Lloyd said he wanted some production value in that picture?

A. Yes. That was in Welcome Danger.

Q. That is right. Does sequence lend any production value to Movie Crazy?

A. I don't remember Movie Crazy so well any more. I didn't work so long on it. I don't know. I saw it in the production.

Q. Did you and the other writers in working out this sequence here attempt to arrive at a unique combination of situations and scenes, or were you just trying to do something in the same combination and sequence that it had always appeared to the public before?

A. About the same.

Q. But that was your idea? A. Yes.

Q. To have the same combination of scenes and sequence that had appeared previously, is that correct?

A. I believe so.

The Court: You did not try to have anything unique? [336]

The Witness: No. The only thing, I remember I suggested the egg. I don't think the egg gag was in there in 1928, and I suggested it in the 1932 version.

Q. By Mr. Fendler: You mean where the drunk hits his forehead with the egg? A. Yes.

The Court: You people did not try to do any original work, is that correct?

The Witness: Well, it is very hard to do a lot of original work.

The Court: I know, but this was not original?

(Testimony of Felix Adler)

The Witness: This was practically a facsimile to the thing that happened before.

Q. By Mr. Fendler: I mean when you created Welcome Danger did you try and have an original combination of scenes that had not publicly appeared?

A. We tried to get a basic angle once in a while. But, after all, it is hard to do, because I don't believe we ever had a story at any time. We were gag men.

Q. What was the story? What was the story use of this sequence in Welcome Danger? How was the sequence woven into Welcome Danger, into the story?

Mr. Abeles: I object, if your Honor pleases. He has two questions at the same time. I think a proper question would be to ask him the nature of the scenes, but not whether [337] or not it was woven into the story.

The Court: I have heard enough about Welcome Danger, counsel.

Mr. Fendler: There is a whole line of cross-examination, if your Honor please, that—

The Court: All right; go ahead. I am going to stay here if it takes to midnight, until you gentlemen unwind.

Q. By Mr. Fendler: Was the magician's coat sequence woven into the story of Welcome Danger?

Mr. Lewinson: Objected to on the ground it is immaterial.

The Court: You have asked him questions about it and he has testified as to the general theme.

Mr. Lewinson: I will withdraw the objection. I thought your Honor considered it immaterial and that is the reason I made the objection.

(Testimony of Felix Adler)

The Court: I considered it a waste of time but Mr. Fendler thinks it is important. I am going to let him unwind.

Mr. Lewinson: I withdraw it, I withdraw it.

The Witness: What is the question?

Mr. Fendler: Mr. Reporter?

(Question read by the reporter.) A. No.

Q. Did the events and incidents occurring in the magician's coat sequence of Movie Crazy have any relationship whatever to the story or development of the plot of Movie [338] Crazy?

A. I don't think so.

Q. You do not think the fact that Harold Lloyd had all of these embarrassing incidents occur while he was dancing with the wife of the movie picture producer that he was trying to get a job from had any story influence, but had nothing to do with the story?

A. No, I don't believe it, but we knew it was a very funny sequence and we could get laughs regardless. We had tried it out before.

Q. In other words, you knew when you put it into Movie Crazy that it was a rather outstanding sequence as a whole, is that right?

A. It is a funny sequence.

Q. Now, will you come back to the previous question? Do you think the fact that the movie producer's wife was insulted and slapped Harold's face when the water squirted at her, and quite obviously was going to renig upon her agreement to help further his career in pictures —do you think that that had any story influence?

(Testimony of Felix Adler)

Mr. Abeles: Just a moment. That question is objected to on the ground it is complex and argumentative.

Mr. Fendler: Question withdrawn and reframed.

Q. Did the fact that the movie producer's wife was the butt of these things which occurred when she was dancing with Harold on the dance floor have anything to do with the general [339] story which related to Harold trying to get into the moving pictures?

A. Well, I don't know just what you mean by the things that happened to her. If you could enumerate what happened to her?

Q. Don't you know what happened to her in the sequence?

A. You mean where a mouse gets down her back?

Q. The mouse down the back, the water in her eye, the rabbit?

A. She didn't know at the time that Lloyd was doing it?

Q. Why did she slap Harold's face then?

A. I don't recall her slapping his face any more.

Q. You do not recall much about Movie Crazy, do you? A. Quite a bit. I wrote on it.

Q. You do not recall just how it fitted into that particular picture?

A. Yes, I do to a certain extent—to a great extent.

Q. Well, do you recall the moving picture producer's wife had agreed to introduce him to her husband in order to help him?

The Court: Counsel, I am going to limit cross-examination.

Mr. Fendler: Very well.

(Testimony of Felix Adler)

The Court: I would like to ask this witness a question. The sequence of the magician's coat as set up in Movie Crazy, had you ever seen such a sequence before? [340]

The Witness: Well, we did it before in—

The Court: I know, but except as you did it for Harold Lloyd?

The Witness: Oh, you mean on the screen, see it on the screen?

The Court: Had you ever seen that sequence?

The Witness: I had never seen it done before on the screen.

The Court: Had you ever seen it on the stage?

The Witness: Well, I have seen fellows get into coats.

The Court: I know, but in every picture somebody has to walk. It is nothing new that somebody walks.

The Witness: That is right.

The Court: It is nothing new that somebody might be slapped?

The Witness: That is right.

The Court: That is the slapping subject of the idea when you take each one and tear it to pieces, but it is the combination.

The Witness: In running gags.

The Court: Did you ever see that combination of gags, you might call it, or events that transpired in that sequence?

The Witness: Not that particular sequence.

The Court: No.

(Testimony of Felix Adler)

Q. By Mr. Fendler: Mr. Adler, you have been employed [341] at Universal during the last year or two?

A. Yes. I was there, I think, up until last March for about 8 or 9 weeks.

Q. Did you use in any picture written by you at Universal the fight sequence from Welcome Danger in a picture entitled The Naughty Nineties which has just been released by Abbott and Costello?

Mr. Lewinson: That is objected to—

The Court: Just a moment. Of what materiality is it?

Mr. Fendler: Now, if your Honor please—

The Court: Wait a minute, now. Just a moment. We are only trying one lawsuit at a time and I don't care in this other picture what he did.

Q. By Mr. Fendler: Mr. Adler, did you collaborate with Clyde Bruckman on the writing of a picture at Columbia entitled Loco Boy Makes Good?

A. Yes.

Q. Which contains this same sequence?

A. I understand it does, but I don't—

Q. All right. Is this the first time that you ever heard about the Columbia picture, which was written by you and Bruckman containing the magician's coat sequence throughout the second reel?

A. I knew it contained it, but we did not put it in.

Q. Who did? [342]

A. I think Julius White put it in, the producer. When we write over there, we write a story and it is hard to recognize it after we get through.

(Testimony of Felix Adler)

Q. You mean Julius White at Columbia told you and Bruckman that he wanted the magician's coat sequence from the Harold Lloyd picture Movie Crazy inserted in that picture?

A. He didn't say from Hadold Lloyd's. He wanted the sequence in, yes.

The Court: How did he designate it?

The Witness: I wouldn't remember anymore. We write a story over there, and the first thing we know there is nothing left of it.

The Court: I know, but that is not the point. You said that he wanted the magician's coat sequence.

The Witness: Yes, something with the magician's coat in it.

The Court: Then you prepared it, did you not?

The Witness: No. We prepare a little bit, and then when he is on the set he changes it around.

The Court: But you saw the picture afterwards, did you?

The Witness: I saw it in the projection room. I don't believe they play around here in Los Angeles. I have never seen a Columbia picture here.

The Court: Did you see the sequence, the magician's [343] coat sequence?

A. Part of it, yes; part of it in the rushes.

The Court: You recognized it as similar to the other one?

The Witness: Yes.

The Court: And did you see the picture So's Your Uncle? Have you ever seen that picture?

The Witness: No, I never saw it.

(Testimony of Felix Adler)

Q. By Mr. Fendler: But you knew when you wrote it and were present on the set when Loco Boy Makes Good was being photographed?

A. I never was on the set.

Q. I understood you to say that it was partly written on the set.

A. I saw some of the rushes, I said.

Q. You do recall, don't you, that after Julius White requested you to insert this sequence, you and Bruckman did write the general outline of it?

A. Yes, made a lot of changes in it, too, put a dance in the center and things like that.

Q. You felt that there was a substantial difference between the sequence as it would be in Loco Boy Makes Good and as used by Harold Lloyd in Movie Crazy, is that correct?

A. I couldn't tell. I saw some of the rushes. I really have never seen Loco Boy Makes Good, so I don't know what is in it. I know the boy gets into the magician's coat. [344]

Q. That was written by you and Bruckman with full knowledge that it had been in the Harold Lloyd picture Movie Crazy? A. Oh, yes.

Q. And Julius White, the producer-director of the picture, knew it as well, is that correct?

A. I don't know.

Q. He told you to put it in, you said?

A. Well, that is what he said, yes.

Q. You had discussed with him the fact that that was in Movie Crazy, had you not? A. No.

(Testimony of Felix Adler)

Q. How did you and Julius White arrive at the creation of that particular sequence for your Columbia picture?

A. Julius White sees every picture in the world, every comedy picture any place. All the writers in any one field, it is already common property and it is a lot of exchange of gags. All comedians do it, Stan Laurel, Laurel and Hardy, all the comedians do the same gags.

Q. You mean that all comedians in the business steal —not individual gags but a continuity of 50 or 60 continuous consecutive scenes—out of each other's motion pictures; is that what you mean?

Mr. Lewinson: Wait a minute. I would like to have the question read. [345]

The Court: Well, I am going to direct the witness not to answer it. It is argumentative.

Mr. Fendler: All right, that is all.

Mr. Abeles: Let me just ask you a couple of questions.

Redirect Examination

By Mr. Abeles:

Q. Now, if you had a story and it comes to a part in the story where you want to work in comedy, you want to work in what you call a gag and stage business, you tie it into the story, don't you?

A. That's right.

Q. There is always a trick of tying it in?

A. Yes.

Q. But your story keeps going along, is that right?

A. That is right.

(Testimony of Felix Adler)

Q. So that in two different pictures you can have two different story lines going along and this comedy can be tied into the story line? A. I believe so.

Q. You mentioned before that these sort of things like gags and stage business were common property. Do you recall the old burlesque days? A. I do.

Q. In fact, I will take you back to the medicine man. [346] Do you remember the medicine man?

A. I used to do medicine shows.

Q. Didn't they used to do all this comedy, different comedy sequences and so-called gags? A. Yes.

Q. And every medicine man would do it?

A. Yes.

Q. And in burlesque isn't it a fact that for years and years every comedian did practically the same sort of sequence, as we call it, or stage business?

A. That is right.

Q. In fact, like the old Flugel Street gang. Do you remember the old Hood and Ward sequence?

A. Where they borrow the hose?

Q. Yes. A. Yes.

Q. They would go through a long story; they would build up and build it up and build it up?

A. That is correct.

Q. And different teams built it up more to go with their own style? A. They did.

Q. One man would add something and one man would add something else or take something away, isn't that correct? A. That is right. [347]

Q. You have always considered these gags, stage business, common property? A. That is correct.

Mr. Fendler: Wait a minute, wait a minute.

(Testimony of Felix Adler)

Mr. Abeles: You opened it up.

Mr. Fendler: No, I did not open up that question. We object to the question as to whether or not he considered it as common property, as irrelevant and immaterial and outside of the issues in the case. What he considered it has nothing at all to do with this case.

Q. By Mr. Abeles: Isn't it a fact that these gag men, gag writers, they all use all these old gags, don't the? A. They do.

Q. They get together sometimes and they trim them up, don't they? A. They do.

Q. Just like they do in burlesque; one trims it up to suit his purpose and another trims it up to suit his?

A. That is correct.

Q. Up to this time you have never even thought that the continuity for some of this was taken from somebody else?

Mr. Fendler: Objected to as irrelevant and immaterial and outside of the issues in this case.

A. That is right.

The Court: He has already answered. Objection overruled. [348]

Mr. Lewinson: No further questions.

The Court: That is all. Call your next witness.

Mr. Lewinson: We rest on the issue of liability, your Honor.

Mr. Knupp: We have no further evidence on that line, if the court please.

Mr. Fendler: We rest on the issue of liability, if your Honor please.

The Court: Gentlemen, it is necessary to continue this case until about the first Tuesday in December for the evidence from the experts.

Mr. Fendler: We object to the continuance, if your Honor pleases.

The Court: I don't know how you are going to get out of it. I am going away on the 23rd and will not be here for some six weeks.

Mr. Fendler: Might we have a conference in chambers, if your Honor please?

The Court: I know. But you suggested this morning that your were both at a disadvantage over this question of liability. I have asked for help from both sides. And I thought that perhaps in the meantime there might be such a thing as a stipulation as to the profits realized from the one picture.

Mr. Fendler: If your Honor please, that involves a situation upon which it would be impossible to stipulate. [349]

The Court: It will cost you $75.00 or $100.00 a day for transcript and special master's fees.

Mr. Fendler: Well, if your Honor please, I would very much like, and I think other counsel would like, to discuss this entire question with your Honor.

Mr. Knupp: On this question of profits, if the court please, we are perfectly willing to submit to counsel all the figures we have, so that he can make any objection he likes to that; and we will submit what our books show with respect to what the picture cost, as to distribution, and what the receipts were. So all the basic figures, at least, will be before the court, and subject to the excep-

tions or objections, and examination by him of the books or files he would like to have examined.

Mr. Abeles: If your Honor is going to take the question of damages and decide whether or not they are damaged, I think that should be isolated from the profits. If your Honor decides they have not proven damages, then I think it should be sent to a reference.

The Court: As to the accounting, if an accounting is necessary, I am going to refer it to a special master. As to the question as to actual damages, I will pass on that question myself when the evidence is all in.

Mr. Fendler: May I call one or two matters to your attention? When it comes to profits, of course, the defendant [350] Clyde Bruckman is not responsible for profits at all. He receives no profits from the picture. And as to the profits to Universal Pictures Company, it is a very complicated situation.

There are some subsidiaries. I think their assistant secretary said there were 57.

Mr. Lewinson: 57 varieties.

Mr. Fendler: Common sources of income, and with a different subsidiary, affiliate or associate in each foreign country; and it is a very complicated situation.

I would not be prepared to accept a figure as to profits. There are questions of overhead. It is a very complicated situation.

Now, so far as the damage situation is concerned, we have put on our evidence. To permit a continuance to the defendants of three months to prepare their side of the case on damages is, after the length of time it has taken to get to trial here—through no fault of your Honor, but, nevertheless, because of the time lapse—if we have a situation where the trial is continued until

December, we go into the matter of damages at that time and then a reference for an accounting, and then a period to time that elapses between the special master's report, confirmation and so on, we are going to take up a great deal of time which all counsel in the case, if your Honor please, feel might better come [351] after the Ninth Circuit Court of Appeals has passed upon this infringement. Because we are just going through a lot of waste motion, if they are correct and the plaintiff is incorrect on the matter of infringement, and all counsel agreed before your Honor this morning that the most expeditious method of handling the case from the standpoint of both parties, if your Honor would enter an interlocutory decree, to permit them to appeal from it, test the issue of infringement, test this question of the issue on damages, and then we should have a decision by December.

The Court: A decision by December?

Mr. Fendler: I believe so.

The Court: What year?

Mr. Fendler: Well, the Ninth Circuit Court of Appeals may be further behind in its schedule.

The Court: If you get a decision in a year and a half you will be lucky, and by the time you get up your records, your briefs and everything under your plan it will mean two appeals, the possibility of two appeals, and you will be the next five years getting this case to a final conclusion.

If I hear the evidence and make the findings, and if I fix damages and the basis upon which they are fixed, the profits are determined, and it goes to the Circuit Court and they determine that there is infringement, then they will either affirm my method of arriving at a judgment

or modify [352] it or send it back to the court with direction.

On the other hand, if we submit it to the Circuit Court on infringement alone, it will go up there for a year and a half, it will come back, take six months or so, assuming, for instance, that you should prevail in the Circuit Court and they find infringement, and then you would have to go back again to find out whether my method of calculation is correct.

Mr. Fendler: I think we all had in mind that the question of whether or not the evidence was properly admitted over objections or not would be determined upon this appeal.

The Court: No, it would not. That would not go before the court unless both sides are in.

As I have expressed myself before, I believe, after seeing the pictures, that there is clearly an invasion of Mr. Lloyd's picture in this script or this magician's coat sequence; and whether or not the defendants can do that with impunity, without liability, is a question the Circuit Court will have to pass upon. But I am satisfied that when the Circuit sees those pictures they will look at them the same as this court has looked at them and any other layman will look at those pictures. And I feel satisfied on that angle.

But I am at somewhat of a loss to arrive at the proper method of ascertaining and fixing the damages. I was going to suggest that, while you have placed evidence on the witness stand in that regard, I do feel that counsel have been some- [353] what misled by some of our discussions in chambers on the element of damages. And even if they had not been misled, I want everybody to feel that they have had their full day in court, whether

they agree with my decision or not. I was going to suggest that both of you, if you desire to, have not more than two experts who will testify on the re-issue value of these pictures and, in the event that they are revamped, whether they have any sale value now or whether they would have had any sale value before So's Your Uncle was released.

I am also interested in and I want evidence on this Columbia picture. I feel that that is an element that the court will, of necessity, have to take into consideration if the court allows any actual damages. The extent of the showing of that film, it seems to me, would have a tendency to lessen Lloyd's claim against the defendants on that issue.

Those are things that I want. I am not going to decide the case just because they hand it to me on a platter, when I feel there is evidence available that will enable me to at least satisfy myself in my own mind that I have rendered an honest and intelligent opinion.

Mr. Fendler: May an injunction issue forthwith, your Honor, against the further distribution?

The Court: I understand this film has been impounded and is not in circulation.

Mr. Abeles: After the statement in the answer on that, [354] there is no point in an injunction.

Mr. Fendler: The answer certainly did not suggest that.

The Court: You can arrive at that by making an application if there is any showing that it is being exhibited.

Mr. Fendler: They claim it has been withdrawn.

Mr. Abeles: It will be.

The Court: There is no occasion for granting an injunction which will have to be on bond to protect the plaintiff.

Mr. Fendler: Not after trial.

The Court: We have not finished the trial. We are in the course of the trial.

Mr. Knupp: We would like to present to the court, of course, before you hear the testimony of these witnesses, our memorandum on the law with respect to this question of damages, so that when the court listens to the expert testimony the court will be fully advised of the proposition.

The Court: I am going to ask that within thirty days each side submit his points and authorities on that question of what is actual damages and the elements of actual damages, and any cases that you have that will throw light as to how that is established.

Mr. Lewinson: Before your Honor's mind becomes set definitely on the matter of liability—

The Court: I have not said that there is liability. I said that I am satisfied it is an invasion, and that whether [355] there is liability or not, I am going to let the Circuit Court of Appeals pass on that question.

Mr. Lewinson: I believe that on the question of the infringement and the question of the right of the plaintiff to prosecute the action, that the court could be further enlightened by original memorandum or additional memorandum; but if your Honor feels that counsel could not be of any further help to the court, of course, we do not want to engage in that labor. But I am quite convinced that if the matter is presented to the court from the

standpoint of infringement, that the court can get further light than it has already obtained; and also from the standpoint of the right of the plaintiff to prosecute his action.

In our memorandum we have not gone into a number of questions which I think the court will have to consider; and I think it is only fair to present to this court the points that the Circuit Court of Appeals will have to consider if a judgment is adverse.

I am saying that in all candor because I think it is the duty of counsel. However, we will be governed by your Honor's wishes.

The Court: I am free to receive any memorandum that counsel wishes; and I hope that however I decide this case it is appealed so that both sides can have the opportunity to spend all the money they want to. As I have expressed myself [356] before, you have decided to wash your linen in public, and I think you should be perfectly willing to pay the bill. And so, as far as I am concerned, I will help you to make your record and I am going to take that into consideration if I grant judgment for the plaintiff in fixing attorneys' fees.

It will only take us a day, will it not, to receive that evidence?

Mr. Knupp: I think that is all, if the court please. I do not think it will take outside of two days at the outside.

The Court: Gentlemen, I can take this up on Friday, the 16th day of November.

Mr. Knupp: That will be satisfactory to us, if the court please.

Mr. Fendler: That will be satisfactory.

Mr. Lewinson: Would the court like a copy of the transcript?

The Court: I expect it.

Mr. Fendler: Pardon me, Mr. Lewinson?

Mr. Lewinson: I suppose we should share equally the expense of the court's copy of the transcript?

Mr. Fendler: Yes.

Mr. Knupp, we have these films that were supposed to be brought down here at ten o'clock in the morning. I will see that they are returned to you, if agreeable. Can it be stipulated that your picture shall be identified as plaintiff's [357] exhibit next in order and the Columbia picture, as your exhibit?

Mr. Knupp: It has already been marked as our exhibit, as I understand it. If the court please, it is perfectly all right to me what happens to these films. The plaintiff's film is returned to his custody until this case is heard on November the 16th and ours is returned to us, and Columbia's is returned to Columbia. It is perfectly all right to me.

Mr. Mendler: And each picture to be available to the other upon reasonable request?

Mr. Knupp: That is right, if we want to show them to witnesses.

Mr. Lewinson: So stipulated.

The Court: I am not going to listen to more than two experts on either side.

Mr. Fendler: We offer into evidence that continuity of Movie Crazy which has superimposed over the photograph of the credits as they appear on the picture.

Mr. Lewinson: Just a minute.

Mr. Fendler: That is the photograph at the bottom of the page.

Mr. Lewinson: I know. But I thought you had rested. Are you asking to have the case reopened?

Your Honor, I do not want to appear to be in the position of being technical, but I think it is obvious that this docu- [358] ment has been changed since yesterday and I refused to stipulate to it without foundation then unless counsel introduced it as it had been delivered to him by Paramount.

The Court: Just forget it. I don't need it, anyhow. I saw the pictures and the scripts do not mean, really, anything to me in that regard.

Mr. Fendler: We ask it be marked for identification, if your Honor please.

The Court: It may be marked for identification.

The Clerk: Plaintiff's 5, for identification.

The Court: All right, that is the order, gentlemen.

(Whereupon, an adjournment was taken until 10:00 o'clock a. m., November 16, 1945.) [359]

Los Angeles, California, Friday, November 16, 1945
9:00 a. m.

The Court: You may proceed.

The Clerk: 4361, Harold Lloyd Corporation, a California corporation, v. Universal Pictures Company, Inc., a Delaware corporation, and Clyde Bruckman, and others.

Mr. Fendler: We are ready for the plaintiff.

Mr. Knupp: We are ready.

Mr. Lewinson: The defendant Bruckman is ready.

Mr. Abeles: Now, if the court pleases, Mr. Fendler cited at the start—I would like to point out Mr. Fendler cited a case, MacKenzie against Congo Pictures Limited, which he said was tried—

The Court: Pardon me just a moment, Mr. Abeles. I understood there was a witness called for this morning.

Mr. Abeles: Do you want to put him on first?

The Court: I think we should dispose of that, then we can go into the other matters.

Mr. Abeles: Mr. Lloyd, will you please take the stand?

HAROLD LLOYD,

called as a witness by and on behalf of the defendants, having been previously duly sworn, was recalled and testified further as follows: [362]

Direct Examination

By Mr. Abeles:

Q. Mr. Lloyd, you testified that the Chaplin picture entitled The Gold Rush had been re-issued. Do you recall that? A. That is correct, yes.

Q. That was a silent picture, was it not?

A. Yes.

Q. Now, do you contend that your silent pictures have a re-issue value? A. Naturally.

(Testimony of Harold Lloyd)

Mr. Fendler: Just a moment. There are no silent pictures involved in this lawsuit, if your Honor please, and we object to any question of Mr. Lloyd which is predicated on something outside of this lawsuit. Movie Crazy is a talking motion picture.

The Court: Objection overruled.

Q. By Mr. Abeles: What value do you put upon the re-issue rights of the motion picture Grandma's Boy?

Mr. Fendler: Just a moment. We are going clear outside the isues in this case.

Mr. Abeles: If your Honor please—

Mr. Fendler: Universal has taken other motion pictures, one of which involves a silent motion picture, The Freshman, and we object to the attempt to try any of these other cases [363] by this line of questioning in this court where no silent picture whatever is involved.

Mr. Abeles: I am not going to bring in any case—any picture involved in any other case. I will tell you that now.

Mr. Fendler: You are bringing in Grandma's Boy.

Mr. Abeles: I have a reason for bringing in Grandma's Boy and I will tie it up and connect it up. The next question will bring it out. After I ask these questions you will find out why I am asking these questions. It is very material and our whole defense is predicated on the questions I am asking the witness.

Mr. Fendler: Then the line of questioning and the purpose should be disclosed, because as it stands it is entirely irrelevant.

The Court: Is the picture Grandma's Boy involved? Is that the name of the picture you asked the witness about?

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The Court: Is the picture Grandma's Boy involved? Is that the name of the picture you asked the witness about?

(Testimony of Harold Lloyd)

Mr. Abeles: "Grandma's Boy" is the picture I asked about. The picture here is Movie Crazy.

Mr. Fendler: And Grandma's Boy is directly involved in other litigation.

Mr. Abeles: How about Girl Shy? Is that involved, too?

Mr. Fendler: I believe all the silent pictures are involved in the other litigation which involves the silent picture The Freshman. [364]

The Court: There is only one picture involved in this case.

Mr. Abeles: But if your Honor please, I am laying a foundation for certain testimony now. I promise your Honor this is very material.

The Court: With that assurance I am going to let you proceed with the question, but it is understood this witness is your witness and you will be bound by his testimony.

Mr. Abeles: That is correct, sir.

Q. What are the re-issue rights of Girl Shy? That is, what are they worth today in your opinion?

The Court: If you know.

A. I don't think anybody—it depends on what I do with it. You are talking about the re-issue rights?

Q. By Mr. Abeles: That is right.

A. Naturally you would have to embellish it today. You would have to narrate it to a certain extent. You would have to score it. That would naturally depend upon how well you did that and who did it. I think I could do it and it would probably be very valuable.

Q. And would the same apply to the picture Safety Last? A. I would say it would, yes.

(Testimony of Harold Lloyd)

Q. How much would you say the re-issue rights of each of those two pictures is today? [365]

Mr. Fendler: That is objected to as incompetent and outside of any issue in the case.

The Court: Counsel, you are asking this witness to give a snap opinion. I am going to advise the witness if he does not know he should say so. It is difficult for a man to fix the value of a picture that he has not studied. If he has studied it and given it consideration that is something else, but to pull something out of the blue sky and ask him what its value is is unfair.

Mr. Abeles: But he testified in this trial, Judge, what the re-issue rights of Movie Crazy were. I assumed he would have in mind what the value of it is.

The Court: Not necessarily. I may know the value of my automobile but would not necessarily know the value of somebody else's automobile unless I made a study of it.

Mr. Abeles: This is his own picture.

The Court: I am going to advise the witness if he doesn't know he may so state.

Q. By Mr. Abeles: You say it is very valuable. What did you mean by that? That the re-issue rights of these two pictures may be very valuable?

A. Just what I repeated before—what I stated before.

Q. If you had made them yourself, you mean?

A. I think so. [366]

Q. I mean if you re-issued these?

A. If I re-issued these myself is what I said.

Q. Suppose you sell the re-issue rights would they be valuable too?

(Testimony of Harold Lloyd)

Mr. Fendler: That is objected to.

The Witness: That is another thing.

Mr. Fendler: Upon the grounds previously stated.

The Court: Objection overruled. Let us get to the evidence.

The Witness: My pictures are not up for sale; therefore, you are asking me about something I haven't gone into.

Q. By Mr. Abeles: Have you ever—withdraw that question. Have the re-issue rights to any of your motion pictures ever been sold or licensed?

A. One, Milky Way for the re-make rights.

Q. You testified before, didn't you, that they had never been sold.

A. Milky Way doesn't belong to me but it happens to be a picture that I started.

Q. Well, outside of Milky Way, eliminate that, have the re-issue rights of any of your other pictures ever been sold, licensed or disposed of?

A. No; because I haven't had them up for sale.

Q. That is all.

Mr. Fendler: Did you have in mind the license to [367] California Picture Corporation?

Mr. Abeles: I did not. I said the re-issue rights.

Mr. Fendler: Are you through, Mr. Abeles?

Mr. Abeles: No, no.

Mr. Fendler: All right, go ahead.

Q. By Mr. Abeles: Now, Mr. Lloyd, you said that you took into consideration when you fixed the value of

(Testimony of Harold Lloyd)

the re-issue rights and the re-make rights that you were going to re-make Movie Crazy, is that right?

A. I don't recall whether I said that or not but it is very probable.

Mr. Fendler: That isn't the testimony.

The Court: I wish you would not interrupt the examination, counsel.

Mr. Fendler: If your Honor please, can't I make an objection?

The Court: Of course you can make an objection, Mr. Fendler. I want to get this evidence in and I do not appreciate your sitting there and making comments. If you have an objection to make get up and make it and I will rule on it. We are going to proceed in an orderly manner.

Mr. Fendler: We object to it upon the ground that was not the testimony of the witness.

The Court: Objection overruled. The record will speak for itself. [368]

Q. By Mr. Abeles: Let me ask you this: Did you have in mind when you testified to the re-issue value and re-make value—

Mr. Fendler: Just a moment.

The Court: To what he had in mind I will sustain an objection to.

Q. By Mr. Abeles: What did you base your figures of the re-issue value and the re-make rights of Movie Crazy on, Mr. Lloyd?

A. In the first place, re-issues and re-make rights at the present time are making tremendous amounts of money. There are many cases that will substantiate that. Abie's Irish Rose, for instance. The re-make rights have just been sold for over $350,000 plus percentages.

(Testimony of Harold Lloyd)

Mr. Abeles: I move to strike that out, if your Honor please. This man did not make the contract and he knows nothing about it.

The Court: Objection overruled. You asked for it and you now have it.

Mr. Abeles: I did not ask him that.

The Court: Counsel, just a moment—

Mr. Abeles: He is not answering my questions.

The Court: You asked the question and the answer will stand.

Mr. Abeles: I asked the simple question— [369]

The Court: Proceed, I have ruled.

Q. By Mr. Abeles: Abie's Irish Rose is a very famous play, is it not? A. I would say yes.

Q. And it ran for many, many months on the stage in New York City, didn't it? A. I think it did.

Q. And played elsewhere—companies went throughout the United States, didn't they? A. I think so.

Q. And it is still a very well known title, Abie's Irish Rose, isn't it? A. I think so.

Q. And the story could be sold over and over again for motion pictures, couldn't it?

A. Well, that is a matter of opinion.

Q. But it has been, hasn't it?

A. I say that is also a matter of opinion.

Q. But I say, you know that it has been sold twice for motion pictures, don't you?

A. I think so but I am not positive.

Q. You are not positive? Didn't you just testify it was sold the second time for motion pictures?

A. This last time, yes; you said "twice".

(Testimony of Harold Lloyd)

Q. You know the picture was first made by Universal, [370] don't you?

A. I don't recall. I never saw it.

Q. You did not even know it was made by Universal?

A. I don't recall it, no.

Q. But you know it? A. Vaguely.

Mr. Fendler: Just a moment, if your Honor please. We object to that as assuming a fact not in evidence. The picture which counsel refers to was the Cohens and Kellys, which I believe was stolen by Universal from Abie's Irish Rose.

The Court: Just a moment, Mr. Fendler. You are talking too much again. Please sit down. If you have an objection to make, please make it.

Mr. Fendler: We object to it on the ground it assumes a fact not in evidence. There is nothing in evidence that Universal ever made Abie's Irish Rose.

Q. By Mr. Abeles: Do you know that Abie's Irish Rose was ever made into a motion picture?

A. Not positively.

Q. I want to read you a question and answer from your testimony in The Freshman action:

"Q. When you say that is its value for re-make purposes, do you mean by that that is the value which someone would pay to acquire the rights?"

You are talking about the re-make rights to The Freshman. [371] Your answer was:

"A. No.

"Q. Or what you figure your company could have made by re-making?

"A. By re-making it.

(Testimony of Harold Lloyd)

"Q. In other words, it is your estimate of what the profit would have been had you re-made it and distributed the picture generally.

"A. What I could probably be able to do with the picture.

"Q. The profit you would have been able to make with it yourself?

"A. That is right."

Now, that applies to Movie Crazy, too.

Mr. Fendler: Just a moment now. If your Honor please, we object to the line of questioning upon the ground that counsel first interrogated the witness—

The Court: Objection is sustained.

Q. By Mr. Abeles: When you testified, Mr. Lloyd, that the re-issue rights of Movie Crazy were worth a certain amount of money you had in mind making it yourself, didn't you?

Q. You are talking about the re-issue or re-make?

A. Yes and no. Could be both ways. I think making it myself would be more satisfactory to me. [372]

Q. That is what you had in mind when you stated the figures that you thought the re-make rights were worth, did you not? A. Not necessarily.

Q. Why did you have that in mind in The Freshman action?

The Court: Just a moment. That is argumentative, counsel.

Q. By Mr. Abeles: Did you have in mind re-making The Freshman yourself or selling the re-make rights?

Mr. Fendler: Objected to as immaterial.

The Court: I am going to sustain the objection. We are not trying The Freshman case.

(Testimony of Harold Lloyd)

Mr. Abeles: Your Honor, he testified in that action—

The Court: That case was tried a long time ago, was it not?

Mr. Abeles: No. This deposition was taken the other day.

Mr. Fendler: That is the case before Judge Hollzer.

Mr. Abeles: Only taken the other day.

The Court: I am going to sustain the objection. We are trying only one lawsuit here.

Q. By Mr. Abeles: If you made it yourself, re-made it yourself, then you had in mind the profits that you would make from the picture, if you re-made it, is that correct? [373]

A. How do you mean? I had in mind I would make it. If somebody else re-made it I think they would make great profits, too. I happened to say that I personally would like to re-make it myself.

Q. But you testified to the re-make value of that picture. You said—

The Court: What picture?

Mr. Abeles: Movie Crazy, the picture involved in this action. I asked you whether or not you intended to re-make it yourself and you said that depended. Now I ask if you had in mind, if you did make it yourself, that the amount that you testified to would be the profit which you might have received from the re-make rights.

A. I don't know whether I said it that way or whether I said I could make it or somebody else could make it. I think somebody else could make equally, probably, as great money if they made it the way I think it should be made.

Q. Can't you answer the question?

(Testimony of Harold Lloyd)

The Court: I think he has answered it.

Mr. Abeles: I don't think, so, judge.

The Court: It is not within your province to pass upon that question.

Q. By Mr. Abeles: You say you had in mind two things—either you would re-make it or somebody else would re-make it, is that correct? [374]

A. Naturally.

Q. Now, if you re-made it did you have in mind that figure you testified to as being the profit that you would make from making that picture?

A. I don't recall what I said in the deposition—whether I said I would get it or somebody else would get it.

Mr. Abeles: Is that a direct answer? I asked him a straight question. I did not ask him what he testified to.

The Court: Read the question.

(Question read.)

Mr. Fendler: The witness testified in two depositions. One case is on trial here and I do not believe that counsel is putting the question in such a manner that the witness can answer it.

The Court: I think the witness can answer the question directly.

The Witness: Will you read the question again, please?

(Question read.)

The Witness: You are asking me to assume something. I think you can make a great deal of profit if I made it myself and I think someone else could make a great deal of profit if they also re-made it.

(Testimony of Harold Lloyd)

Q. By Mr. Abeles: When you gave a certain figure as the value of the re-issue rights if you made it yourself, you had in mind the profits you would make, didn't you? It [375] couldn't be anything else.

The Court: That has been asked and answered several times, counsel.

Q. By Mr. Abeles: Upon what did you base the figures that you gave?

The Court: What figure is that?

The Witness: What figure are you speaking about?

Q. By Mr. Abeles: How much did you consider the re-make rights of Movie Crazy were worth?

A. How much the re-make rights of Movie Crazy?

Q. That is right.

A. Well, they could be worth anywhere from 3 to 4 to five hundred thousand dollars. It would be according to how it is re-made and how well it is done.

Q. When you state that figure who have you got in mind would re-make it? You or somebody else?

A. Myself or somebody else. It would be according to how well done it is. That is what I tried to make plain.

Q. If you re-made it yourself the figure you have in mind would be the profits that you anticipate making from the re-making of that picture, is that right?

The Court: Just a moment, counsel. That is not a fair question. This witness testified it would depend upon whether he made it or somebody else made it and if it was well made. You turn around now and try to twist that answer. [376] You may be able to do that in New York, but you cannot do it in this court. You might as well make up your mind to that.

(Testimony of Harold Lloyd)

Mr. Abeles: Your Honor, I am not twisting his answers. I am asking the witness a straight question upon what he bases that figure if he re-made it himself.

The Court: That wasn't the question at all.

Mr. Abeles: That is the question I am asking.

The Court: He has already answered that question.

Mr. Abeles: He has never answered it. I am sorry. He has never answered it. He ducked it each time. He evaded it.

The Court: Just a moment, counsel. He has testified that large sums of money could be made out of it whether he made it or some other actor took the leading role in it, all depending upon whether it was well done. He has not confined it to his own acting.

Mr. Abeles: I asked him if he did make it himself upon what does he base that figure. Don't you think I am entitled to that answer? That is all I am asking. It is a simple question. I am stymied by him saying it is four or five hundred thousand dollars. I cannot ask him what he bases that upon.

The Court: You may ask him that.

Mr. Abeles: That is all I am asking. That is what I have been trying to get for ten minutes, but I haven't succeeded. [377]

The Court: You may ask the question, but remember you are bound by this witness' testimony.

Q. By Mr. Abeles: What do you base that figure upon if you re-made it yourself? That is a simple question. Just answer that, please, Mr. Lloyd.

A. Well, I just stated that other pictures have been made, many of them.

Q. Is that an answer?

(Testimony of Harold Lloyd)

The Court: In other words, that is your opinion from your experience in the industry?

The Witness: Other pictures have been re-made and made tremendous amounts of money. What is the reason to assume that my picture cannot be just as good as the other pictures that have been re-made?

Q. By Mr. Abeles: Well, I am asking you what do you base that figure on? Do you base it on the profits you would make from it if you re-made it yourself? That is all I am asking.

A. Your question is very vague to me. I don't know just what you are driving at.

Q. How would you make $400,000 or $500,000 if you made the picture yourself? Do you mean the profit you would make out of it? Is that what you have in mind?

A. Naturally that is what you would make out of it.

Q. All right. That is all I have been trying to get. [378] Now you say other pictures have been made and they made a lot of money on re-make—let me ask you this question: Do you know one single picture, just one, made by a named comedian that had a secondary story and situation comedy that has been re-made, and that means Chaplin, you, Keaton, St. John, Langdon, Laurel & Hardy—anybody. Just name one single picture of that type that has ever been re-made?

A. I am doing something right now in a picture that no other comedian has done in motion pictures; I don't think they have. I don't know whether they have or haven't.

Q. You don't know, then. That is enough.

A. I wouldn't go that far to say that. I simply say that because you are asking me the question. I would

(Testimony of Harold Lloyd)

want to look it up. I am not assuming that it has not been done.

Q. But you don't know of any one instance where it has been done, do you?

A. I know the picture that Chaplin made, The Gold Rush.

Q. I am not saying that; I say re-make.

A. I claim it could be done by him. Whether they have done it or haven't done it I think is beside the point.

Q. That is beside the point? Well, in all these years if one single picture has ever been re-made of that nature, that is beside the point, is that right?

Mr. Fendler: Objected to as argumentative.

The Court: Yes, it is argumentative, counsel. I am not [379] going to permit you to impeach your own witness as you go along.

Mr. Abeles: I have the answer I wanted, Judge.

The Court: All right, then you have finished?

Mr. Abeles: No, just a couple more questions.

Q. Now, the re-make rights, the re-make value of a picture depends upon the production company, the producer, the director, the nature and cost of the production, the stars, the cast, the distribution, the advertising, the publicity, the press notices, public fancy and other factors, does it not?

A. I would say no matter how good any of those things are they are not good if you haven't the vehicle to start with.

Q. But you have to have all of those factors, too?

A. Not always. It is better to have them but there have been pictures made sometimes what we call a flare.

(Testimony of Harold Lloyd)

Q. But you do know, don't you, Mr. Lloyd, that the same picture could be made by one company under one set of conditions and be a financial failure, and made by another company under other conditions and be a financial success? There is no question as to that?

A. I told you it all depends on how good a picture is made.

Q. The answer is yes? [380]

A. I said according to how well the picture is made.

Q. I want to read a statement to you from the brief, just two short statements and then I am through. It was a brief submitted in the action instituted against your company by Sadie *Whitworth*. You recall that case, don't you? A. Very well.

Mr. Abeles: It is a statement of fact on page 5.

Mr. Fendler: Just a moment. That is a quotation from a book—

Mr. Abeles: And I am going to read just a portion of it.

Mr. Fendler: If he is going to read a portion let us have it all in.

The Court: Just a moment. I am not going to let you read it at all. That case has been tried and settled. We are not interested in that.

Mr. Abeles: This is a statement of fact where he said in that case—

The Court: I am not interested in what he said in that case. How many years ago was it tried?

Mr. Abeles: Quite a few years ago. I just say this so it will be in the record. I wanted to establish by this testimony that the witness testified in that case that in pictures of this nature, that is in his pictures, that it is

(Testimony of Harold Lloyd)

not the story that meant anything but the situation. Comedy is developed for his personality. Now, if that will be con- [381] ceded, that is all I want.

Mr. Fendler: We are not conceding anything.

The Court: I am not going to permit you to impeach your own witness.

Mr. Abeles: I respectfully submit he is not my witness.

The Court: Yes, he is. You called him as your witness. He was excused and I told you this case was continued for a specific purpose, that is, to hear two experts on each side and you issued a subpoena for this man and brought him into court. I told you in my chambers this morning I would permit you to use him only as your own witness, and when you called him you called him as your own witness.

Mr. Abeles: Judge, I am not impeaching him. When I am reading from a record as to what the witness said in that case, that the story of his pictures meant nothing, only the comedy which was created for his personality.

The Court: Counsel, I have ruled.

Mr. Abeles: That is all. Under the circumstances, I can't go any further with this witness.

The Court: I would like to ask Mr. Lloyd a few questions.

Q. What is the final disposition of a picture after it has once been exhibited?

A. Well, after a picture has been withdrawn from circulation it is generally held for a certain number of years.

The Court: Where is it held? [382]

(Testimony of Harold Lloyd)

The Witness: Well, whoever happens to own it. If the studio owns it they probably keep it in their laboratory and then after so many years if they feel there is a different audience for it then it is considered for either re-issue or re-make.

The Court: Are these pictures ever destroyed?

The Witness: I think some of them have been destroyed on account of film condition and probably maybe for space. If they are considered really very valuable pictures then they keep them.

The Court: Is there any sale value to those pictures? Is there any trading in the industry in those old pictures?

The Witness: You take an old picture like the Klansman which Griffith made many years ago—I think, as I recall—I am speaking vaguely now, but I think it was re-issued and probably made quite a bit of money, and I think DeMille's King of Kings or his Ten Commandments were re-issued at various times.

The Court: How about comedies?

The Witness: Comedies the same way.

The Court: Will you see if this is a fair statement? I have this impression either obtained from the evidence or from my general knowledge of the industry, that these pictures are retained and are considered a stock in trade of the various producing companies and that after a lapse of time they either [383] use certain incidents in those pictures or in other pictures the same as was done in this case. You first made Movie Crazy and later used from that picture certain parts for other pictures. And in addition to that other studios will buy from a studio pictures that have been produced in the past, is that correct?

(Testimony of Harold Lloyd)

The Witness: Oh, yes, they buy the story, re-make it sometimes. For instance, Milky Way at the present time is a picture that I starred in and had a 50 per cent interest in. That particular picture sold to Samuel Goldwyn. I think it was sold for around $125,000.00.

Mr. Abeles: I move to strike that out. He thinks it was sold for $125,000.00.

The Witness: I think it can be proved.

Mr. Fendler: We have the records in court, if your Honor please.

Mr. Abeles: I say now it was not sold for $125,000.-00.

The Court: I don't care whether it was sold for 75 cents. What I am trying to find out is the practice in the industry.

Mr. Abeles: Will your Honor strike out that testimony then?

The Court: Yes.

The Witness: I am trying to explain to his Honor exactly how it is. [384]

The Court: I am trying to get some information, not knowing a great deal about the industry and how they handle such things.

The Witness: Milky Way is being made over at the present time with Danny Kaye in a musical and they keep our picture that I made there as a guide for them to go by and they make scenes and they say, "Go in and look at the old picture." Goldwyn has told them—Danny Kaye told me this personally. He said—

The Court: Anyway, they are using that picture?

The Witness: Yes, as a guide.

(Testimony of Harold Lloyd)

The Court: And is that more or less of a common practice in the industry?

The Witness: Well, it could be.

The Court: Well, do you know whether it is?

The Witness: I think it is to a degree.

The Court: Do you know whether or not there are people engaged in the moving picture industry as agents who try to place these old pictures or sell them to other studios?

The Witness: Yes, I think that is very true. I think, in fact, someone representing Goldwyn recently has had a lot of Goldwyn pictures for re-issue or re-make. I think my counsel has figures on that.

The Court: And do they interchange them between studios?

The Witness: I think so.

The Court: You don't know?

The Witness: I am not positive, because I have kept [385] myself more or less in the production end of the business. However, I have been injected into the distribution end of the business and all the other forms of the business in producing my own pictures, but I try to concentrate more on the production itself.

The Court: That is all.

Mr. Abeles: Just one question.

Q. You mentioned Milky Way. Now, Milky Way was not an ordinary story written for you, was it?

A. No.

Q. As a matter of fact it was a famous stage play, wasn't it? A. May I say one thing?

Q. Yes, go ahead.

A. They didn't use the stage play. When we made Milky Way we changed it from the stage play. We

(Testimony of Harold Lloyd)

changed it all around. It was entirely different for a motion picture version and when Goldwyn made it they didn't take the stage play. They used our play, the motion picture, as the guide to make their picture.

Q. What do you mean, Goldwyn made it? Goldwyn has not made it yet, has he?

A. I am afraid he has. It is called The Kid From Brooklyn.

Q. He has not completed it? [386]

A. If he hasn't they are on the final scenes, because, as far as I know, they shut down on it—unless they came back to put added scenes into it. I am working on the same lot.

Q. Who were the authors of that play?

A. I do not recall the authors of the stage play.

Q. Wasn't Harry Clark one of the authors?

A. I dont know who the authors of the story were.

Q. You know Harry Clark is a well known writer, don't you?

The Court: What materiality does that have?

Q. By Mr. Abeles: Do you know the play had its opening at the Kort Theatre and it had a long run in New York City?

A. I don't see what point that has to do with it.

Q. I am asking you if you recall.

The Court: I do not think the witness has a right to make objections, but I think his objection in this instance is good.

Mr. Abeles: I am trying to establish that the only one ever sold was a famous stage play and not a story written for him. The whole point in this case is that in no single instance in the history of the motion picture

(Testimony of Harold Lloyd)

business has a single individual comedy ever been sold for re-make rights—that is, for re-make rights where the story was written [387] for the comedian and situation comedy and not based on a famous stage play or novel. This is the only one that they have sold. I am trying to point out why they sold it, is because it is a famous stage play. That is what I am trying to bring out. It was published in book form many times and circulated throughout the United States in various published forms and played throughout the United States. Stock companies went out. It is still being played throughout the United States. That is what I am trying to bring out.

The Witness: As far as I recall—I didn't recall that Milky Way was such a big smash hit on Broadway.

Q. By Mr. Abeles: You didn't? I have a report here. Do you know who Liggett & Johnson are?

Mr. Fendler: Just a minute, if your Honor please. A report? That is from some third party.

The Court: Counsel, that is a collateral matter. You are arguing about something that is collateral. I was asking general questions as to the practice in the industry which will probably come out through other witnesses that have handled that end of the business and will be qualified to testify.

Q. By Mr. Abeles: You do recall it was a stage play, don't you? A. Yes, I do. [388]

Mr. Fendler: Objected to as having been previously asked and answered.

Mr. Abeles: I never got the answer.

The Court: Counsel, I have heard enough argument between counsel. Will you please proceed?

(Testimony of Harold Lloyd)

Mr. Abeles: All right, Judge. You see the reason why I want to pursue this line of questioning—

The Court: If there is any reason for it I do not know what it is.

Mr. Abeles: That is all.

Mr. Fendler: I have one or two questions, if your Honor please.

The Court: Very well.

Cross-Examination.

By Mr. Fendler:

Q. At the previous hearing, Mr. Lloyd, you testified that you did not know what theatres the Columbia short had been exhibited in nor the type of theatres it has been exhibited in or played in, but that you believed that the Columbia short might have done you a great deal of harm if it had played in all of the theatres that the Universal feature picture So's Your Uncle played in. Do you desire to correct that answer?

Mr. Abeles: I object to it on the ground that was not the answer—if it played in all the theatres that the [389] Universal picture played in. You read the transcript and you will see it does not say that.

Mr. Fendler: Page 127, line 1.

The Court: Counsel, and this applies to each of you. You both talk too much in the first place and in the second place you get up in an aggressive manner, which is not necessary at all. There is no jury for you to impress and it certainly does not impress me. You are both wasting your time and energy. If you will just sit down in your chairs and not jump up as though you are ready to jump into the ring all the time we will get along better.

(Testimony of Harold Lloyd)

Mr. Abeles: I thought you were supposed to stand up.

The Court: You may stand up when you want to address the court but you do not have to jump up and lean against the desk here as though you are waiting for a chance to jump into the ring when opposing counsel asks a question.

Mr. Abeles: If your Honor please, then I respectfully object on the ground that is not the testimony in the record. I ask counsel to read the testimony and then ask his question.

Mr. Fendler: Page 125. I will start at line 23 so we will get the sequence.

"The Court: What would you estimate the damage done to you by the Columbia picture?

"The Witness: I haven't gone into that, your [390] Honor. I would say it is minor compared to So's Your Uncle. I haven't gone into that.

"The Court: In other words, you do not know?

"The Witness: Not at the present time, no."

Then recross-examination by Mr. Knupp:

"Q. I think you said specifically, Mr. Lloyd, that you had no idea in how many theatres the Columbia Picture was circulated?

"A. I just heard it stated here.

"Mr. Fendler: No, no. 'Columbia,' he says.

"Mr. Knupp: The Columbia picture.

"A. No, I haven't.

"Q. And if it should develop that it was circulated in approximately the same number of theatres as the Uni-

(Testimony of Harold Lloyd)

versal pictures, would your answer that the Columbia picture had done you no harm still be the same?

"A. No, because I would say it was the type of theatre that it plays in.

"Q. If it appears that it was circulated in the same type of theatres as the Universal picture, would you still say that the Columbia picture had done you no harm?

"A. I would say it had done me a great deal of [391] harm if it had been played in all the theatres the other one played in."

Mr. Fendler: Now, the question that I asked the witness was whether he had desired to correct that answer or to enlarge on it.

Q. Do you, Mr. Lloyd?

A. May I answer that?

Q. Will you, please?

A. I have had time to think it over. My opinion is that a short does not compete with a feature picture. In the first place, a great many times shorts are purchased by the theatres but are not always shown. Many, many times—a great many times in the evening they haven't time to show them. Sometimes they are purchased and never show them. Another thing, in this particular short the comedy is done so broadly and so unbelievably bad and it is in such a hodge-podge of comedy sequence that I cannot possibly see how that could do anything but very minor damage and certainly not keep us from re-making or re-issuing a picture.

Q. In your opinion, then, the circulation of the Columbia short during the years 1942 and 1943 did not impair

(Testimony of Harold Lloyd)

the value of the re-issue rights or re-make rights of your motion picture, is that correct? A. That is correct.

Mr. Abeles: I object to that. [392]

Q. By Mr. Fendler: Now, counsel asked you one or two questions upon the question of—I will withdraw that. That is all.

Redirect Examination

By Mr. Abeles:

Q. Mr. Lloyd, you know since the last hearing the deposition of an officer of Columbia Pictures Company has been filed in this court, don't you?

A. I think vaguely I heard something about it. I don't know the details.

Q. Has that anything to do with the change in your answer from the last time?

A. No, it definitely has not.

Q. And the fact that he said it played various types of theatres throughout the United States, in more theatres than So's Your Uncle, that had nothing to do with changing your answer, did it?

A. There was quite a bit of discussion the other time about whether the short had previously damaged our picture and I thought I might as well make that clear because when it was asked me before I had no time to think about it but since then I have had time to think about it.

Q. But you did assume at that time that a short would not play as many theatres as the Universal picture So's Your Uncle? [393]

A. I stated at that time it was vague and I didn't know what the answer was.

(Testimony of Harold Lloyd)

Q. But you were surprised when you heard the short did play more theatres, more than the Universal picture?

A. I don't recall how many it played.

Q. Don't you think, sir, if anyone sees a sequence in a short it would have the same effect as if he saw it in a Grade B picture?

A. In that short, no. It was done so poorly and as I said, so unbelievably bad and in such a hodge-podge I don't think it could hurt anybody.

Q. Wouldn't it hurt you more done in that manner than in a fine manner?

A. No, because in a fine manner is what we try to do—a very believable manner. If it is done that way and made a part of the story then it hurts us tremendously.

Q. It was done substantially the same in the Columbia picture as it was in your picture, was it not?

Mr. Fendler: Objected to as argumentative.

The Court: I did not hear the question.

Q. By Mr. Abeles: It was done substantially the same in the Columbia picture as it was done in your picture?

The Court: Gentlemen, I have decided that I am going to see the picture. There is no use talking any more about that. I will see the picture myself and then will make up [394] my own mind.

Mr. Abeles: Then I won't have to talk about that. That is all right, sir.

Mr. Fendler: That is all, Mr. Lloyd.

The Court: The witness is excused.

Mr. Fendler: I hope so.

The Witness: May I thank the court for its consideration in moving up the hour of the hearing? Thank you very much.

Mr. Fendler: If your Honor please, we subpoenaed a witness, the general manager of the Samuel Goldwyn Pictures Corporation. Counsel for Universal has denied that the sale price of the re-make rights of Milky Way was $125,000. Mr. Selvin, who represents Samuel Goldwyn, asked me whether I would be willing to have this witness disregard the subpoena if he brought the original contracts to court at which time the defendants might desire to object upon the ground that the evidence of the payment of $125,000 for the re-make rights was immaterial and incompetent, upon which the court would rule, and if the court overruled the objection, then in such event the fact would be received in evidence just as if the witness testified to it here in person. Is that the understanding, Mr. Selvin?

Mr. Abeles: Wait a minute, Mr. Selvin.

Mr. Herman Selvin: If I may state to the court, the [395] position that I took with Mr. Fendler and with counsel for the defendants also—I am perfectly willing to produce and have the contracts in question. I do not desire that they be made public property unless they be ruled competent and relevant to the issue in this case. Whether they are or not, I don't know. I have nothing to do with that. If they are ruled to be admissible the contracts are here and I am sure that the parties could agree that they are correct copies of the contracts without the presence of Mr. Ezzell.

Mr. Fendler: That is the understanding, your Honor, so we submit it to your Honor for your ruling.

The Court: Counsel, what another picture sold for in my opinion is not admissible. It would be like saying

two buildings were sold, one for a small price and one for a high price without an appraisal. An appraisal would have to be made of those buildings to determine whether one was comparable to the other. The same is true with pictures that may have been sold. One may have been sold for a large sum of money but whether it is comparable to another picture is a different question altogether.

Mr. Fendler: May I say, if your Honor please, that the defendants have produced evidence in this case that none of the Harold Lloyd pictures have any re-issue or re-make value. Now, it appears to me—

The Court: That is all right. There is a conflict and [396] that is what the court is going to have to rule upon. Mr. Lloyd has testified that they have. I will hear the evidence and then I will make my ruling or a finding on that.

Mr. Fendler: We respectfully submit, your Honor, that the defendants have offered evidence that the Harold Lloyd picture has no re-make value and Mr. Lloyd has testified that Milky Way, which we can show never recouped its negative cost and was a picture which did not begin to be as successful as Movie Crazy, that the re-make rights sold for $125,000. That is not only fully corroborated by Mr. Lloyd's statement, which has been denied by defendants' counsel, but it is a complete rebuttal of the defendants' expert evidence that the re-make value of the Lloyd picture—

The Court: I haven't heard the expert evidence yet.

Mr. Fendler: I am referring to Mr. Geller's testimony which was produced at the last trial in which he so testified.

The Court: Well, that is a question of fact, gentlemen, for the court to pass upon. While I have not had

an opportunity to fully explore all the briefs in this case, particularly those that were showered upon me this week, and one of which contains nearly 60 pages, covering the entire subject matter and arguing the evidence and so forth, this hearing is held for a specific purpose and that is to [397] determine whether or not Mr. Lloyd suffered any damages by reason of this Universal picture.

I have heretofore indicated my attitude and a rereading of the testimony has convinced me that there has been a willful and deliberate infringement here. It was not an accidental occurrence. It was deliberate and willful. There has been an interference with the property rights of Mr. Lloyd. Counsel argues that such a finding is speculative. When it comes to the amount of damage that, to a certain extent, may be true. But I do not believe you can interfere with a man's property rights without some damage resulting. In my mind damage has been established. The question is how much, and that is what this hearing was called for this morning.

Counsel has spent considerable time on the question of profits and accounting. I think the Sheldon case gives us the clue for determination of damages.

In that case it fixed the apportionment, but the language used in that case wherein the committee report was quoted, indicates that this present section was modeled after Section 70 of the patent Act. While it speaks of damages and profits, nevertheless at the present time I am of the view that if the profits in the court's opinion were not sufficient to cover the damages the court can then make a finding of damages and add to those profits a sufficient [398] amount to cover the damages.

In other words, the plaintiff is not entitled to both damages and profits. He is entitled to one recovery.

I may be wrong and I will give you gentlemen an opportunity to convince me when we are through with the introduction of evidence. But I am now interested solely in the question of damages. I do not know whether counsel have been able to stipulate as to the amount of profits made on this picture.

Mr. Fendler: I think we will be able to, your Honor. Mr. Knupp and I have discussed it.

The Court: It may be when that figure is produced in the court's mind it will be sufficient, an adequate amount. On the other hand, if the court should feel it is not the court will add such an amount to it in the form of damages as it thinks proper.

As I stated before, I am not impressed with these figures that sound like the national debt that come out of Hollywood, but I am going to listen to the evidence and I suggest that counsel introduce the evidence that the court has indicated it is interested in.

Mr. Abeles: If your Honor please, on the other point Mr. Fendler raised, I never contended that you couldn't sell the re-make rights of any motion picture, comedy motion picture. In fact, I pointed out Milky Way was a very famous stage play. What I said was, you couldn't sell any other [399] type. Now, so far as the Goldwyn contract is concerned, I cannot see how another picture is any evidence of the value of this picture. Under the authorities I have got it has to be the same standard source.

The Court: That is my attitude and approach.

Mr. Fendler: Is my offer of proof denied?

The Court: Proceed with the evidence.

Mr. Fendler: Is there a ruling on my offer, if your Honor please?

The Court: I am not going to admit it.

Mr. Fendler: Then may it be so stipulated, Mr. Knupp, that the price of the re-make—

The Court: I said I was not going to admit it.

Mr. Fendler: Oh, you are not? I apologize. Do you have another witness, Mr. Abeles?

Mr. Abeles: I have some proof to put in.

The Court: Counsel, at the time of the adjournment the defense was introducing their evidence and I was not satisfied with it and I gave the defendants a continuation for an opportunity to get what I considered better evidence.

Mr. Knupp: If the court please, I thought both sides were going to have an opportunity to put in testimony with reference to damage and we thought the plaintiff would finish their case first.

The Court: They finished their case and rested. [400]

Mr. Knupp: But I understand they have additional witnesses.

The Court: I assume they can call witnesses in rebuttal. You were on your proof at the time of the adjournment. You put certain witnesses on and I thought they were not qualified to assist the court and I explained that to you and told you that in the interest of justice the court wanted to give you an opportunity to obtain better qualified witnesses so the court would have the benefit of that evidence. Now, if you do not want to put them on—

Mr. Abeles: I had the man here, Judge. I flew him from New York, but I must have misunderstood.

The Court: We will take a recess for a few minutes if the witnesses are not here.

Mr. Fendler: We have some matters we can take up.

Mr. Abeles: May I put in some formal proof? May I go ahead with that, your Honor?

The Court: Yes.

Mr. Abeles: If the court please, Mr. Fendler mentioned in his memorandum to you the case of Byron MacKenzie vs. Congo Pictures, Limited. He said in that case in the United States District Court for the Southern District of New York the court had awarded the plaintiff $150,000 for the use of some incidental or more or less minor material. I had that case looked into and I find it was ten years ago and that in that [401] action there was no judgment awarded by a court awarding plaintiff any money at all. It was a confession of judgment for $150,000 after an injunction was granted. And also that they had bodily taken the plaintiff's picture, which was a travelogue, and took all the scenes and put them into their picture.

I have the certified copy of the judgment showing it was never satisfied. It was a defunct corporation which permitted a judgment to be taken by confession, which was never satisfied, and I have the confession of judgment itself and the affidavit upon which it was based, and I would like to submit them.

Mr. Fendler: May I see the papers?

The Court: You may submit those when the case is submitted. They are not evidence in the case.

Mr. Abeles: Now, if the court pleases, on the profits we will stipulate that the profits on the picture So's Your Uncle were $20,517.28. However, that may amount, I understand, to about $22,000. There may be some returns coming in. You see they stopped the picture immediately

they received notice of Mr. Lloyd's claim, but there may be some monies coming in from various exchanges throughout the world and they seem to think it will be about $2,000 more. However, that will only be subject to deduction. It might be subject to deduction of taxes which would not amount to much, but [402] apparently all the other deductions are here. In other words, the gross proceeds were $208,812.92. Against that the negative cost, and when we say "negative cost" we mean all overhead going into the making of the picture. That amounted to $104,693.00 Besides that, there is incidental expenses for printing, advertising, and so forth, so the total costs were $133,874.50, leaving a difference of $74,938.42, from which would come the distribution fees throughout the world, which amount to $54,421.14, leaving $20,570.20 which may go to about $22,000.00.

Mr. Fendler: Well, if your Honor please, I informed Mr. Knupp I desired certain specific information which does not appear upon this sheet. This is the first moment that I have had an opportunity to inspect this sheet and I repeat that I think I will be able to agree upon a stipulation with him. I am not prepared to stipulate, however, until I get the information that I requested, so I will take the matter up with Mr. Knupp between now and two o'clock, and by two o'clock I hope to be able to enter into a stipulation on the profits.

I might say, for example, there is no indication on this sheet as to what the charge has been for overhead, if any, and—

The Court: Well, if you get into an argument over that I will give you an opportunity to go before a special master. [403] I am not going to go into that.

Mr. Fendler: I say we will be able to reach a stipulation, I think, but I feel I am entitled to certain information which Mr. Knupp has agreed to produce for me.

The Court: Is there anything else?

Mr. Abeles: Yes, your Honor. I think your Honor asked for certain data—that is, you suggested certain data should be brought into the evidence and I think this is what you had in mind. The first preview of the picture Movie Crazy—I mean, I am sorry, So's Your Uncle, was July 20, 1943, at the Alexander Theatre in Glendale, California. The first exhibition of that picture in Los Angeles was on January 5, 1944. The picture was generally released—that means throughout the United States, on December 3, 1943—

The running time of the picture Movie Crazy, and these figures will be subject to check by Mr. Fendler, of course, at any time he so desires—

The Court: Why don't you submit the figures and see if you cannot agree upon them?

Mr. Abeles: You agree to those facts, don't you?

Mr. Fendler: So far there is no reason why I should not stipulate as to what Mr. Abeles read, and I do stipulate so far as his facts show those are the facts.

Mr. Abeles: Now, they have used a stop watch over there at Universal and I have the man who can testify to it. He [404] says that the running time of Movie Crazy by stop watch was 65 minutes, 40 seconds. He says the running time of the magician's coat sequence, and he starts from when the magician starts checking up his props and the magician taking the coat from the bus boy and threatening to hit him, and the time of that is 11 minutes, 14 seconds. Is that so stipulated?

Mr. Fendler: Pardon me.

Mr. Abeles: From the time he starts checking—

Mr. Fendler: I will stipulate to it although I do not remember any bus boy in the Lloyd picture.

Mr. Abeles: Well, he took the coat away from someone in a threatening manner.

The Court: Who did?

Mr. Abeles: The magician.

Mr. Fendler: That is correct, that is correct. That is 11 minutes. So stipulated.

Mr. Abeles: The running time of the picture So's Your Uncle is 63 minutes and 21 seconds and the running time of the magician's coat sequence, and he says this is likewise from the time the magician started checking up on his props and until the time he takes the coat away from the bus boy, that is 6 minutes, 1 second.

The running time of the Columbia picture *Loco* Boy Makes Good was exactly 18 minutes and the running time of the magician coat sequence in that picture he says is six minutes, [405] 15 seconds.

Mr. Fendler: I will so stipulate.

Mr. Abeles: Now, I offer in evidence a communication from Mr. Fendler dated March 20, 1945, to Mr. Nathan J. Blumberg, president of Universal Pictures Company, Inc., which I understand was the first notice of any claim as to this picture Movie Crazy—So's Your Uncle.

Mr. Fendler: You mean the first written communication from the plaintiff's attorney?

Mr. Abeles: That is correct.

Mr. Fendler: So stipulated, and it may be received in evidence.

The Clerk: Defendants' Exhibit G.

(The document referred to was marked as Defendants' Exhibit G, and was received in evidence.)

[DEFENDANTS' EXHIBIT G]

Law Offices
HAROLD A. FENDLER
Suite 1111 Pershing-Square Building
Los Angeles 13, California
Telephone MIchigan 3293

March 20, 1945.

Mr. Nate J. Blumberg, President,
Universal Pictures Co., Inc.,
Universal City, California

Dear Sir:

At Mr. Harold Lloyd's personal request, I am writing to advise you concerning a series of copyright infringements which may not have been heretofore brought to your personal attention:

Ten days ago Universal Pictures Co. Inc. released a motion picture starring the Andrews Sisters, entitled "HER LUCKY NIGHT" which is a flagrant infringement upon the copyrighted motion picture photoplay entitled "THE FRESHMAN" starring Harold Lloyd and copyrighted by the Harold Lloyd Corporation.

Within the last thirty days Universal released a motion picture starring Joan Davis entitled "SHE GETS HER MAN" which is a flagrant infringement upon two copyrighted motion picture photoplays starring Harold Lloyd respectively entitled "WELCOME DANGER" and "PROFESSOR BEWARE".

Several months ago Universal released a motion picture photoplay entitled "SO'S YOUR UNCLE" which is a flagrant infringement upon the copyright of the Harold Lloyd motion picture entitled "MOVIE CRAZY".

(Defendants' Exhibit G)

In each instance former employees of the Harold Lloyd Corporation, particularly Clyde Bruckman and Warren Wilson, now working for Universal Pictures Co., have been given screen credit as writers and/or producers of the infringing motion pictures.

The Harold Lloyd Corporation has repeatedly requested Universal in writing to withdraw "SHE GETS HER MAN" and "HER LUCKY NIGHT" from public distribution in order to mitigate the damages which have been sustained. To date these requests have gone unheeded and Mr. Lloyd has personally asked me to direct this last appeal to the individual executive officers of Universal in the sincere hope that your corporation would not persist in continuing infringements which are destroying the most valuable assets owned by my client.

A copy of this letter is being sent to the other executive officers of Universal Pictures Co., and my client would appreciate an immediate expression of your intentions in this matter.

Very truly yours,

Harold A. Fendler

HAROLD A. FENDLER

Attorney for Harold Lloyd Corporation

HAF:AD

Copies to:

Mr. Samuel Machinovitz, Treasurer,

Mr. Edward Muhl, Assistant Secretary,

Mr. Cliff Work, Vice President and General Manager.

No. 4361-BH-Civ. Harold Lloyd Corp. vs. Universal, et al. Defts. Exhibit G. Filed Nov. 16, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

Mr. Abeles: Is Mr. Ward in court?

The Court: We will take a few minutes' recess at this time.

Mr. Abeles: I just wanted to ask him one thing. Your Honor, at this time I would like to offer in evidence, and I understand it is on file, isn't it? The deposition of the Columbia Pictures Corporation. I have a copy here. It is the deposition of George Josephs of Columbia Pictures Company, taken on October 31, 1945, at 2:00 p. m., before Shirley Wiley, Notary Public in New York City. [406]

The Court: Are you going to introduce the deposition in evidence?

Mr. Abeles: I offer it in evidence with the direct and cross interrogatories.

Mr. Fendler: That is satisfactory. We will stipulate it may be deemed to have been received.

The Court: And the court will do its own reading.

Mr. Abeles: It is stipulated it will be deemed to have been received in evidence.

The Clerk: Defendants' Exhibit H.

(The deposition referred to was marked as Defendants' Exhibit H, and was received in evidence.)

[DEFENDANTS' EXHIBIT H]

United States District Court
Southern District of California
Central Division

Harold Lloyd Corporation, a California Corporation, Plaintiff, vs. Universal Pictures Company, Inc., a Delaware Corporation, Clyde Bruckman, John Doe, John Doe Corporation, Defendants. Civ. 4361-BH.

Deposition of GEORGE JOSEPHS, taken on behalf of defendant, Universal Pictures Company, Inc., at 729 Seventh Avenue, New York City, New York, at 2:00 p. m., October 31, 1945, before Shirley Wiley, a Notary Public within and for the County of New York and State of New York, pursuant to the annexed Notice.

GEORGE JOSEPHS,

having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposed and testified as follows:

Answers to Direct Interrogatories

To the first interrogatory he says:

George Josephs. I reside at 401 Marlborough Road, Cedarhurst, Long Island.

To the second interrogatory he says:

Yes.

To the third interrogatory he says:

Columbia is engaged in the production of motion pictures and the distribution of motion pictures in the United States and throughout the world and has been so engaged since in or about 1928.

(Defendants' Exhibit H)

To the fourth interrogatory he says:

I was first employed by Columbia in 1928. My present capacity is that of assistant to the general sales manager and for eight years prior to the assumption of my present position I was the manager of the Sales Accounting and Statistical Department.

To the fifth interrogatory he says:

Yes.

To the sixth interrogatory he says:

Yes.

To the seventh interrogatory he says:

Two reel comedy.

To the eighth interrogatory he says:

To the extent of the number of theatres in the United States where said motion picture has been exhibited. Records as to the particular places and the dates of exhibition on short subjects are not maintained in the Home Office and it would be impracticable for me to obtain such information.

To the ninth interrogatory he says:

I cannot state and our Home Office records do not disclose in what city and state and in what theatre in the United States said motion picture was first exhibited.

To the tenth interrogatory he says:

Our records do disclose that the said motion picture was generally released in the United States on or about January 8, 1942.

To the eleventh interrogatory he says:

We do have one record known as our branch shipping sheets which does disclose that the motion picture was

(Defendants' Exhibit H)

last exhibited in the United States in the Huggin Circuit theatre in Smithville, Arkansas.

To the twelfth interrogatory he says:

Our records indicate that said picture was exhibited in all states in the United States.

To the thirteenth interrogatory he says:

I cannot state how many cities the picture was exhibited in, but our records indicate that said picture was exhibited in all types of cities, both large and small, throughout the United States.

To the fourteenth interrogatory he says:

According to our records the picture was exhibited in 7,065 theatres in the United States and that the type of theatres in which these exhibitions took place varied from large to small.

To the fifteenth interrogatory he says:

I cannot, without a detailed examination of many thousands of individual shipping sheets which cover shipments of films made by our 31 branch offices in the United States over a period of several years, determine the dates of exhibition and name of each theatre in which same was exhibited in Los Angeles.

To the sixteenth interrogatory he says:

Our records indicate that said picture has been exhibited in all types, kinds and characters of motion picture theatres in the United States, varying from large to small theatres in metropolitan areas as well as theatres in large and small towns.

(Defendants' Exhibit H)

To the seventeenth interrogatory he says:

I cannot answer your interrogatory 17 without a detailed examination of the records of our 31 branch offices relating to a period of several years and such examination would ordinarily consume a period of many months and at considerable expense.

To the eighteenth interrogatory he says:

Our records do not disclose nor do I have any personal knowledge of the nature and type of any motion pictures or of any specific motion picture with which said short subject was exhibited.

To the nineteenth interrogatory he says:

He makes no answer.

To the twentieth interrogatory he says:

Our records do not disclose and I cannot from my experience give any approximation of the number of times said picture was actually exhibited in the United States. Our records disclose, however, that the picture was licensed for exhibition to 7,065 theatres in the United States.

To the twenty-first interrogatory he says:

He makes no answer.

Answers to Cross-Interrogatories

To the first cross-interrogatory he says:

No.

To the second cross-interrogatory he says:

I am employed by Columbia Pictures Corporation in the capacity of assistant to the general sales manager and specifically my duties are to assist him in the carrying

(Defendants' Exhibit H)

out of his functions as general sales manager and the gathering and furnishing to him of statistical and other information concerning the distribution of Columbia's motion pictures throughout the United States.

To the third cross-interrogatory he says:

Yes.

To the fourth cross-interrogatory he says:

We are in possession of records which reflect that said motion picture has been exhibited in 7,065 theatres in the United States, the amount of film rental received from such licensed exhibitions and other detailed branch records which indicate the theatres and towns in which such exhibitions took place; said branch records being shipping sheets which list all shipments of Columbia Pictures product. These shipping sheets are the original source of the tabulated Home Office record showing the total number of engagements licensed and total income received, and such records relate to Loco Boy Makes Good.

To the fifth cross-interrogatory he says:

The shipping sheets to which I have referred.

To the sixth cross-interrogatory he says:

The shipping sheets that I have referred to contain information regarded in the industry as confidential and relate to all of the motion pictures distributed by Columbia throughout the United States during a period of four years and the detail of the income received by it from each such picture. Therefore, we cannot attach copies

(Defendants' Exhibit H)

thereof. In addition, to attach copies or to try to summarize same would be extremely expensive and burdensome as it would involve the examination of many thousands of shipping sheets. Individual records as to the exhibition of this motion picture in individual theatres are maintained only in our branch offices.

To the seventh cross-interrogatory he says:

There is attached and initialed by me a true copy of the tabulations from our records of the information furnished weekly in the shipping sheets and relating to said picture from the date of its release to the present date, indicating the number of theatres in which said picture has been exhibited in the United States as 7,065.

To the eighth cross-interrogatory he says:

Yes.

To the ninth cross-interrogatory he says:

The aggregate cost of Loco Boy Makes Good was $19,578.00.

To the tenth cross-interrogatory he says:

I have indicated in my answers to earlier inquiries the reasons why we cannot attach copies of all of the books and records to which I have referred and which would indicate the name of each theatre in the United States wherein the picture has been exhibited and the dates of exhibition thereof.

George Josephs

(Signature of Witness)

(Defendants' Exhibit H)

State of New York, County of New York—ss.

I, Shirley Wiley, a Notary Public within and for the County of New York and State of New York, do hereby certify:

That prior to the propounding of the annexed direct and cross-interrogatories to the witness whose signature is affixed to the foregoing deposition, to-wit, George Josephs, he was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That the said testimony of the witness was taken down by me in shorthand at the time and place set forth in the said deposition, and was reduced to typewriting by me;

That the foregoing deposition is, to the best of my knowledge and belief, a full, true and correct transcript of the answers of the said witness in response to the said direct and cross-interrogatories propounded to him by me;

That when the said deposition was reduced to typewriting it was read by the said witness, who was duly informed by me of his right to make such corrections therein as might be necessary to render the same true and correct, and was thereupon signed by the said witness in my presence.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 5th day of November, 1945.

(Seal) Shirley Wiley

Notary Public in and for the County of New York, State of New York.

(Defendants' Exhibit H)

Shirley Wiley, Notary Public, New York County. New York Co. Clerk's No. 322, Register's No. 500-W-6. Certificates filed in Bronx Co. Clerk's No. 47, Register's No. 30-16. Kings Co. Clerk's No. 203, Register's No. 526-W-6. Commission Expires March 30, 1946.

UNITS BILLED WEEKLY "LOCO BOY MAKES GOOD"

Release Date Jan. 8, 1942

1/29/42

Week		Week		Week		Week	
3rd	196	47th	69	91st	8	135th	2
4th	84	48th	63	92nd	9	136th	2
5th	91	49th	64	93rd	12	137th	6
6th	95	50th	103	94th	13	138th	1
7th	134	51st	89	95th	15	139th	1
8th	98	52nd	49	96th	15	140th	5
9th	99	53rd	37	97th	11	141st	2
10th	116	54th	21	98th	13	142nd	2
11th	148	55th	81	99th	6	143rd	0
12th	118	56th	42	100th	12	144th	2
13th	120	57th	46	101th	11	145th	3
14th	108	58th	40	102nd	20	146th	2
15th	171	59th	61	103rd	16	147th	1
16th	124	60th	30	104th	9	148th	3
17th	112	61st	31	105th	4	149th	2
18th	116	62nd	36	106th	4	150th	2
19th	129	63rd	39	107th	25	151st	5
20th	182	64th	32	108th	6	152nd	3
21st	122	65th	24	109th	7	153rd	1

(Defendants' Exhibit H)

Week		Week		Week		Week	
22nd	135	66th	27	110th	10	154th	3
23rd	115	67th	32	111th	20	155th	0
24th	170	68th	23	112th	7	156th	1
25th	102	69th	27	113th	1	157th	1
26th	124	70th	23	114th	10	158th	1
27th	117	71st	26	115th	8	159th	3
28th	145	72nd	42	116th	1	160th	0
29th	121	73rd	23	117th	9	161st	2
30th	104	74th	20	118th	8	162nd	3
31st	103	75th	24	119th	4	by month	10
32nd	108	76th	27	120th	11		2
33rd	153	77th	22	121st	7		2
34th	109	78th	13	122nd	29		6
35th	105	79th	10	123rd	0		6
36th	80	80th	16	124th	8		5
37th	134	81st	19	125th	4		3
38th	81	82nd	12	126th	4		——
39th	90	83rd	21	127th	2		7065
40th	86	84th	13	128th	5		
41st	91	85th	16	129th	6		
42nd	135	86th	9	130th	2		
43rd	72	87st	33	131st	4		
44th	85	88th	12	132nd	6		
45th	71	89th	13	133rd	1		
46th	109	90th	16	134th	5		

GJ

[Endorsed]: Filed Nov. 8, 1945. Edmund L. Smith, Clerk, by E. M. Engstrom, Jr., Deputy Clerk.

No. 4361-BH. Harold Lloyd Corp. vs. Universal, et al. Defts. Exhibit H. Filed Nov. 16, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

Mr. Fendler: If your Honor please, there were certain answers to interrogatories from Universal which were ordered made on or before November 12th, and which were supposed to have been here the first part of the week. I would like to inquire whether or not the answers are in court or will be shortly made available because we desire to offer that in evidence.

Mr. Abeles: May I respectfully state the situation is this: When I received notice from Mr. Knupp that we had to answer these interrogatories I directed the New York office of the Universal Pictures Company to use every effort to get that as soon as possible.

The Court: I have read your affidavit. [407]

Mr. Abeles: And they said it would take three months. I told them they had to do it within a week. Now, the last word I had was that it was supposed to be sent here airmail, but the planes were grounded four days in New York and they told me it would be in pencil form only and it would be pretty bulky, but I have not gotten it yet. The only thing I can do is telegraph New York today and find out when it was sent and we can stipulate it will go in evidence when it is received.

Mr. Fendler: That is satisfactory except I wanted to use it for the purpose of cross examining the experts you were introducing today.

Mr. Abeles: They are not going to testify to that. What can I do. I can't do the impossible.

The Court: I appreciate that. We will take a five-minute recess at this time.

Mr. Knupp: Before your Honor adjourns there is one matter in connection with the transcript, a correction that requires being made. It is in connection with when these films were introduced in evidence. I refer to page 281 of the transcript. It appears from the record that the film So's Your Uncle is marked as defendant's Exhibit D. I understood that to be the plaintiff's exhibit and I think it should bear a plaintiff's exhibit number.

Mr. Fendler: There are some other corrections in the [408] transcript and I will get together with Mr. Knupp on the list and we will stipulate to them.

Mr. Knupp: That is satisfactory as long as the transcript is corrected before we adjourn.

The Court: We will take a five-minute recess at this time.

(Short recess.)

The Court: You may proceed.

Mr. Fendler: May it please your Honor, I am going to fill in some of the time until my 11 o'clock witnesses are here by recalling Mr. Landau, who had not seen the Columbia short when he last testified. We reserved the right to have him see the short and then testify. That reservation was made at the time, so with your Honor's permission, I will call Mr. Landau.

The Court: Are you gentlemen willing the witnesses come on indiscriminately?

Mr. Fendler: Yes.

Mr. Abeles: Yes, Judge.

ARTHUR M. LANDAU,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows: [409]

Direct Examination.

By Mr. Fendler:

Q. Your name is Arthur M. Landau? A. Yes.

Mr. Fendler: This is simply recalling the witness for clarification, your Honor.

Q. At the last hearing, Mr. Landau, you were asked whether or not you had seen the Columbia short. You testified you had seen Movie Crazy and So's Your Uncle, but you had not seen the Columbia short entitled Local Boy Makes Good. Have you witnessed a showing of that short since the last trial? A. I have.

Q. Now, did your inspection of that short alter your opinion as to the testimony you have previously given with respect to the impairment or destruction of the value of the re-issue and re-make rights of the Harold Lloyd motion picture Movie Crazy?

A. No, it does not.

Mr. Lewinson: I think the question is unintelligible. May I have it read?

(Question read.)

Mr. Lewinson: By what?

Mr. Fendler: The Columbia short.

Mr. Lewinson: If that is the question I have no [410] objection.

The Court: You can cross examine him on that if you care to.

Mr. Lewinson: I did not understand it from the form of the question.

(Testimony of Arthur M. Landau)

The Court: I want to say, frankly, gentlemen, while I have not seen the Columbia short and, as I stated before, I expect to see it before the case is finally submitted, that I am interested in that picture and I feel that the court is of necessity going to have to take that into consideration in fixing and damages. I want as much light on that subject as I can get and I would appreciate your directing this witness' testimony along those lines.

Mr. Lewinson: I did not understand the question. It seemed to me to be incomplete. That was the only reason I interrupted. Excuse me for the interruption.

Q. By Mr. Fendler: Now having observed that Columbia short, does it alter your opinion and testimony previously given? A. No, it does not.

Q. Will you explain to the court why not?

A. Well, when I looked at that short, and this is only my personal opinion, I could not conceive how anything could be made as badly as that. It is really the lowest—

The Court: It uses the same sequence, does it not? [411]

The Witness: Yes, it uses it but it does not use the same fine comedy values that showed up in Movie Crazy and which were later on used in the Universal picture. In addition thereto, the same writers were on it, the identical writers, as I recollect.

Q. By Mr. Fendler: Mr. Landau, will you state why in your opinion—

Mr. Lewinson: Let the witness complete his answer. He is in the middle of an answer.

Mr. Fendler: He is going beyond the question.

The Court: I am perfectly willing that you permit him to talk.

(Testimony of Arthur M. Landau)

Mr. Lewinson: That is what I thought.

The Court: He asked you to explain why you do not consider that as injuring the value of the picture Movie Crazy. [412]

The Witness: Frankly, I think any intelligent exhibitor who bought that picture or who sees it wouldn't want to show it.

Q. By Mr. Fendler: Is there any practice or custom—

Mr. Abeles: I move to strike that out, if the court please.

Mr. Fendler: The next question will take care of that.

Q. Is there any custom or practice in the moving picture industry—

The Court: Just a moment. There is a motion to strike that I have to rule on.

Mr. Abeles: Withdrawn, if your Honor please.

Q. By Mr. Fendler: Is there any custom or practice in the moving picture industry by which exhibitors book shorts but do not exhibit them?

Mr. Abeles: If your Honor please, I object to that. It is a question of how many times a picture was exhibited. We have a deposition in evidence showing it was exhibited over 7,000 times. Now, what does that have to do with it?

Mr. Fendler: There is no evidence as to whether this picture was exhibited any time. The only evidence is as to its being booked in 7,000 theatres and we desire to show it is the custom and practice of exhibitors in the picture business, who are compelled to buy these shorts in order to get the feature pictures produced by the com-

(Testimony of Arthur M. Landau)

panies, to book them [413] and that it is the custom and practice for them to use them as fillers, but that normally for the evening entertainment when they have a double feature bill that they run the double features and they run the newsreel and the trailers and they do not show the comedy shorts.

The Court: That might be true also with the exhibition of So's Your Uncle.

Mr. Fendler: Not with the double feature. The exhibitor must, and we will show that is the custom and practice, that the exhibitor must show the two features which he has advertised and which are exhibited upon the marque, but that the practice on a double feature house is to omit the comedy short in the evening performances and, of course, many theatres only have evening performances.

Mr. Abeles: He says they have got to show the two features. Of course they do, but they can show a feature with a short or with a B picture too every day in the week. I would like to point out counsel said the deposition of Mr. Joseph did not show the number of theatres in which it was exhibited.

Mr. Fendler: I said the names of the theatres.

Mr. Abeles: No, you didn't. You said the numbers. You said the numbers did not show they were exhibited in. He said, Judge, if you might recall, he said it showed the numbers of theatres booked and the number not exhibited in. [414]

Now, in answer to an interrogatory he said there was a tabulation from our records of the information furnished weekly and the shipping sheets relating to said picture from the date of its release to the present date,

(Testimony of Arthur M. Landau)

including the number of theatres in which said picture has been exhibited in the United States as 7,065.

The Court: Proceed.

Q. By Mr. Fendler: All right. Mr. Landau, will you state whether there is such a custom or practice?

A. May I pick up that thread. It just so happens that my father was one of the oldest exhibitors in the city of New York. We opened a string of theatres in Washington Heights, most of which have been sold but some are still operating. My brother runs them now. I know many times we buy comedies that come along with the features and we don't show them. Sometimes it is because they are not good and sometimes if we have a lot of people that we want to get in and out of the houses to make two complete shows, in order to shorten the time of exhibition we eliminate the comedies. We do that particularly if it is a two-reeler. We usually use a newsreel or a cartoon comedy or something like that to shorten a two-reel comedy so that they can get the full show of the two features in.

Mr. Abeles: I move to strike out all of the testimony on the ground that the deposition of Mr. Joseph shows that [415] these pictures were actually exhibited in 7,000 theatres, so whether he and his brother or his father at times did not exhibit certain shorts is wholly immaterial.

Mr. Fendler: If the court please, they have their evidence and we have ours. Mr. Josephs is an official of Columbia Company and could have no personal knowledge as to whether the pictures that were booked in these theatres were actually exhibited and his testimony cannot raise higher than the information which he has

(Testimony of Arthur M. Landau)

available. He states that his testimony is based upon their bookings.

The Court: Counsel, on the other hand there isn't anybody who can testify those pictures were actually exhibited because they would not have such personal knowledge. Why not let me have the evidence that each of you have in regard to that and let me take it for what it is worth.

Mr. Abeles: Just one point. You said he wouldn't have the knowledge. I understand they do have the knowledge. They have an actual check when it is exhibited. They must know when the picture is exhibited.

The Court: But wouldn't that be heresay?

Mr. Abeles: It would come from the records, Judge. He couldn't go to every theatre in the country, but the exchange sends him the facts and that information shows the picture has been exhibited. As a matter of fact, the price depends on that many times. [416]

The Court: Counsel, I think you would make a fine witness in this case if you were called to the witness stand.

Q. By Mr. Fendler: Mr. Landau, is what you have described a custom and practice which to your own knowledge is followed in various parts of the country?

A. Yes, sir.

Mr. Abeles: I object to that on the ground the witness could not possibly have any knowledge of the fact, whether the various theatres throughout the United States sometimes don't like a short and don't show it. How can he tell which shorts they don't show and don't like or do show and do like?

(Testimony of Arthur M. Landau)

Mr. Fendler: I have laid the foundation. This man was in distribution for years, but I will lay it again if your Honor feels it is necessary.

The Court: I am going to restrict the answer to what he has already testified. He states after seeing the picture that it has not changed his views nor his former testimony. I am going to limit his testimony to that point and then when they cross examine him I am going to restrict his cross examination because you are going beyond the limits.

Mr. Fendler: We will stop right now then.

Mr. Abeles: You won't have to, Judge, because I am not going to cross examine him. I don't think he testified to anything that is material.

Mr. Lewinson: No questions. [417]

Mr. Fendler: I will recall Mr. Bentel.

GEORGE R. BENTEL,

heretofore sworn on behalf of the plaintiff, was recalled and testified further as follows:

Mr. Fendler: These are not the two experts. I understand I am privileged to call these witnesses in rebuttal. I am trying to get this record clear because they had not seen the Columbia short before.

Direct Examination.

By Mr. Fendler:

Q. You have been sworn, Mr. Bentel?

A. Yes, sir.

Q. Now, Mr. Bentel, before when you testified previously, you testified, I believe, that you had seen the pic-

(Testimony of George R. Bentel)

ture Movie Crazy but had not seen the Universal picture So's Your Uncle. Upon what did you base your testimony at that time?

A. Well, I had read the script but I had not seen the Universal picture.

Q. You had read the script of So's Your Uncle?

A. That is right.

Q. Have you since the trial both witnessed a showing of the picture and also a showing of the picture Local Boy Makes Good, the Columbia short? A. Yes. [418]

Q. Does your inspection of the Universal picture, So's Your Uncle, change your mind from the testimony which you gave from having read the script of So's Your Uncle? A. No, it doesn't.

Mr. Lewinson: Just a moment, your Honor. The witness' testimony was stricken out.

Mr. Fendler: No, it wasn't.

Mr. Lewinson: Just a moment. The witness' testimony in which he gave an opinion as to damages was stricken out on the ground that no proper foundation had been laid, because it appeared on cross examination that he had not seen the picture and he hasn't given any testimony that is in the record, and I think the matter ought to be approached in a different manner.

Mr. Fendler: If your Honor please, what occurred was at the time—

The Court: What page are you referring to?

Mr. Lewinson: Page 189, line 9.

"The Court: I am rather inclined to think, Mr. Fendler, that this witness' testimony should be stricken. He has not seen this other picture and I do not see how

(Testimony of George R. Bentel)

he can, as an expert, qualify when he has not seen the picture."

Mr. Fendler: Then on the next page the court said:

"The Court: I am going to strike his evidence as to the elements of amounts of damages. His experience, etc., will [419] not be stricken, but his testimony as to the elements of damages, that is, the amounts that he has testified to here, will be stricken. Does that make the record clear?"

Now in that connection in view of the fact that we have the witness here and that he has now seen the picture, and having previously read the script and having seen the other picture, I am going to ask your Honor whether you will reinstate the evidence now that we have connected it up.

The Court: I think that is proper.

Mr. Lewinson: I think he ought to give evidence now. He has laid the foundation now. Let him give his evidence now.

Mr. Fendler: It is already in the record and I wanted to connect up the fact that he had seen the picture.

The Court: Gentlemen, I think it could be covered more quickly by asking the questions rather than arguing about it.

Mr. Fendler: Well, I just wanted to ask the two questions and then they can cross examine him.

Q. Mr. Bentel, you have seen the Universal picture So's Your Uncle, is that correct? A. I have.

Q. Has that changed the opinion which you formed after reading the script and to which you previously testified here? A. No. [420]

(Testimony of George R. Bentel)

Q. Have you seen the short, the Columbia short, Local Boy Makes Good? A. I have.

Q. Now, I think that you previously testified that that might have impaired the remake or re-issue value of—

Question withdrawn.

Having seen the Columbia short, is it your opinion that the Columbia short damaged or impaired the value of the reissue or remake rights of Movie Crazy?

A. Definitely not.

Mr. Abeles: I object on the ground the witness is not qualified to answer the question. He is not qualified to answer the question. There is no foundation shown. He is not in the picture business. He is merely an agent. I do not see how he could possibly answer the question.

Mr. Fendler: He has been in the theatrical and moving picture business and agency business for about 30 years so if he is not qualified—

The Court: I think that goes to the weight of it, counsel. He has testified as to his qualifications.

Mr. Abeles: I will withdraw it for the moment until I can ask him some questions.

Q. By Mr. Fendler: Your answer was "definitely not," is that correct? A. Yes. [421]

Q. Will you explain your reasons for that testimony?

A. Well, particularly the Columbia short was probably one of the worst pictures I have ever seen. I would not understand why any exhibitor would want to show it. He might be obliged to buy it to get a feature from the same releasing organization but I couldn't understand why he would want to exhibit the picture.

(Testimony of George R. Bentel)

The Court: Let me ask a question. Assuming that the patrons of motion pictures had seen that short do you feel that that fact would change your view?

The Witness: No.

Q. By Mr. Fendler: Will you explain—

The Court: In other words, you feel that this sequence, even if used in a poor picture, would have no effect upon the re-issue or remake rights?

The Witness: It was so badly done, that picture sequence, and the particular picture itself, that I believe the short was forced on exhibitors to get other pictures.

The Court: I know what you believe, but just assume for instance, and the court is going to have to make this assumption, that when the figures are given here as to the type of theatres they were displayed in, the court is going to have to assume that the theatre-going public saw that picture.

Now, it is your assumption that the exhibitors did not [422] show the picture because they thought it was a poor picture or because they wanted to save time. Assuming for instance that the theatre-going public saw that sequence in the Columbia short, would that fact in itself in your opinion have any detrimental effect upon the value of Movie Crazy?

The Witness: No.

Q. By Mr. Fendler: Now, why do you say that?

A. Because the Lloyd picture was so superior and that particular situation was handled so much better in the Lloyd picture that you got an entirely different impression.

Q. Well, in your opinion wouldn't there be any difficulty or impairment in the re-issue of the Lloyd picture

(Testimony of George R. Bentel)

Movie Crazy or the remake of the Lloyd picture Movie Crazy by reason of the fact that this short had been witnessed by a large number of theatre goers?

A. I don't believe so.

Mr. Fendler: That is all.

Cross-Examination.

By Mr. Abeles:

Q. Were you in the court room, sir, when Mr. Lloyd testified that the reason the use of the sequence in the defendants' picture injured him was because people would think he was a copyist? Do you recall that?

A. No, I don't.

Q. You were sitting here at the time, weren't you? [423]

Mr. Fendler: That is argumentative and immaterial. The record will speak for itself.

The Court: I think the question is proper. The objection is overruled.

The Witness: No, I don't recall it.

Q. By Mr. Abeles: Assuming that Mr. Lloyd so testified, he would still be a copyist, wouldn't he, if the public saw it in the short or saw it in the defendant's picture?

A. You mean a copyist if it was remade?

Q. Copyist. In other words, the public would still think he was a copyist if they are going to think of it at all?

Mr. Fendler: Objected to as argumentative. He is arguing on the basis of what some other witness testified to.

The Court: Counsel, it may help to clear the atmosphere if I state that I cannot help but feel that any pre-

(Testimony of George R. Bentel)

vious use of this sequence would have some detrimental effect. It will be hard to convince me that it did not have any effect. I say that notwithstanding your experts. I am going to have to determine that for myself after I have seen the short. Expert testimony as to whether it had any effect upon its value will have, as I stated before, very little weight with me because I cannot help but feel every time a sequence is used it simply increases the damage to the Lloyd picture. To argue to me to the contrary is just wasting your [424] time.

Now, the amount of damage to be awarded is a question for the court to determine under all of the circumstances in the case.

I do not need expert testimony on that feature so I will ask you to proceed along some other line.

Mr. Fendler: All right. That is all.

Mr. Abeles: Just a couple of questions on your qualifications.

The Court: After my statement I do not see why you should question the witness further.

Mr. Abeles: Just on his general qualifications. I want to bring out something about this witness in answer to counsel's question—that is to say plaintiff's counsel's question as to what plays in pictures he produced.

Q. By Mr. Abeles: You answered Bird of Paradise, Irish Rose, Upstairs and Down, Peg of My Heart. Which of those—

Mr. Fendler: Not pictures, plays, counsel.

Mr. Abeles: You said plays and pictures, sir.

The Court: Counsel, if you want to make an objection, make it.

(Testimony of George R. Bentel)

Mr. Fendler: All right, your Honor. I object to this. I object to the question on the ground that the witness did not so testify, that he made those pictures. [425]

Mr. Abeles: I am going to read from the record at page 170. This is your question:

"Will you mention some of the plays and pictures produced by you during that time?

"A. Bird of Paradise, Abie's Irish Rose, Upstairs and Down, Peg of My Heart."

Now, which of those pictures were produced by you?

A. Plays. I was general manager of the organization that produced the plays and sold the picture rights.

Q. But you did not produce those pictures yourself?

A. I haven't mentioned in that testimony the two pictures we made for the Morosco organization.

Q. Which were those?

The Court: Just a moment, Mr. Fendler; just a moment, please.

Q. By Mr. Abeles: You did not personally produce any of these plays, did you?

A. I was general manager of the organization that did produce them.

Q. But you did not say that before, did you? You said you produced them?

The Court: That is argumentative.

Mr. Abeles: Withdraw that.

Q. Now, Abie's Irish Rose was produced by Ann Nichols?

A. Initially by us, by the Morosco Company, Oliver [426] Morosco Company.

(Testimony of George R. Bentel)

Q. Was it ever produced on the stage by Oliver Morosco?

A. Absolutely, the initial production was in Los Angeles.

Q. For how long a time? A. 26 weeks.

The Court: That is immaterial.

Q. By Mr. Abeles: You said: "In 1928 we sold the motion picture rights to Paramount for $125,000," for that picture.

The Court: From what page are you reading?

Mr. Abeles: 180.

Q. To the picture Abie's Irish Rose. Isn't it a fact that Ann Nichols sold those rights?

A. But we were the producers. She was the author.

Q. She never produced a play at any time?

A. She produced it in New York under her name but the original production and the interest was held by us.

Q. Now, you say the trade papers and newspapers announced that the same picture was purchased for Bing Crosby for $350,000 and a percentage of the gross. You have no definite knowledge on that, have you?

The Court: Counsel, I am going to limit your cross-examination at this time. You had an opportunity to cross- [427] examine this witness when he was on the stand before and I am not going to permit you to go over that cross-examination again.

Mr. Abeles: I had to investigate the facts.

The Court: I understand, but at the same time you had an opportunity to cross-examine him and I am not going all over this picture again. I gave you gentlemen

(Testimony of George R. Bentel)

a full opportunity to examine these witnesses because I wanted to be fair with you.

Mr. Abeles: And you certainly were, sir. May I ask this one question. Before doing so, I want to say that I am attorney for 20th Century-Fox and have been for a number of years. Now, he testified to a transaction and I got the papers out and I find the transaction is not what he said it was. It is entirely different.

The Court: Isn't that a collateral matter?

Mr. Abeles: All right, sir. It is only as to his qualifications, Judge. That was all. He didn't know these facts actually. He took newspaper clippings and statements he heard from the air because he was only off in this case $135,000.

The Court: As I said before, I will give you full opportunity to take the witness stand and testify. I think I will have to call you as a court's witness before we get through.

Mr. Abeles: That is all. [428]

Mr. Fendler: That is all.

Now, if the court please, there are certain corrections in the transcript upon which Mr. Knupp and I have agreed and I think Mr. Lewinson will concur.

Mr. Lewinson: I will concur in any correction that Mr. Knupp acquiesces to.

Mr. Fendler: At page 63, line 20. The third word is "figures" instead of "pictures." May it be so stipulated, Mr. Knupp?

Mr. Knupp: Read them all. We have gone over all of them. I will stipulate to all of them at once.

Mr. Fendler: All right, sir. Does your Honor have the place?

The Court: Yes.

Mr. Fendler: "Figures" instead of "pictures." And page 168, 13. That notice of copyright should be precisely as set forth on lines 16 and 17 of page 167.

The Court: Do you want to change that?

Mr. Fendler: That should be changed.

The Court: On page 68, and what line?

Mr. Fendler: Line 12. "Produced by Harold Lloyd Corporation, William R. Frazier, General Manager, copyright 1932." That should be followed by the words "Harold Lloyd Corporation" instead of being placed on the next line. In other words, the words "Western Electric Recording and Harold [429] Lloyd Corporation" are transposed. It should read "copyright 1932, Harold Lloyd Corporation, Western Electric Recording. Passed by the National Board of Review."

Reporter's transcript, page 170, line 9, should read "Before that time" and not "before my time." The word "that" should be substituted for the word "my."

And at page 288, line 7, instead of the numerals 916 it should be 9,160.

The Court: Just a cipher extra after the figure 6?

Mr. Fendler: Yes. The decimal point is in the wrong place.

Mr. Lewinson: That is one of the few papers, your Honor, where he is entitled to add a cipher.

The Court: Well, people out in your particular atmosphere place decimal points differently than I do so I am perfectly willing to have this brought up to date, to meet your atmospheric conditions.

Mr. Fendler: May it be so stipulated, Mr. Knupp, and do you have any other corrections?

Mr. Knupp: The only one I suggested was on page 281, where it appears the exhibit offered by the plaintiff was in fact offered by the defendant. I don't know that it makes any difference.

The Court: I don't know what difference it makes, do you? [430]

Mr. Knupp: Except it is the plaintiff's evidence instead of defendant's.

Mr. Fendler: We will stipulate for any purpose you may want to use the exhibit for it may be deemed a plaintiff exhibit and offered on behalf of the plaintiff as well as the defendant so it becomes a joint exhibit.

Mr. Knupp: We did not offer it. It was offered by the plaintiff as part of the plaintiff's case.

The Court: In other words, it should be marked Plaintiff's Exhibit D.

Mr. Fendler: That is satisfactory.

The Court: It will be so corrected.

Mr. Knupp: The other changes that counsel suggests are agreed to, if the court please.

Mr. Fendler: Now, I will also enter into a stipulation with you, Mr. Knupp, at this time that the figures which you have previously given the court on So's Your Uncle of $208,812.92 shall be deemed to be the gross proceeds to until and including July 14, 1945, of the motion picture So's Your Uncle. And it is my understanding that you will stipulate that the negative cost of $104,693.42 includes an overhead item of 25 per cent or $26,172.00 roughly.

Mr. Knupp: I don't know that that is so, if the court please. I prefer to prepare a stipulation in which we

broke down that negative cost into the various items. [431]

The Court: Gentlemen, on this question of profits on this picture, there is only one item that the court is interested in. If you gentlemen cannot agree on that then we will have to refer the question to a special master. The court is only interested in one question: What were your profits? Your gross receipts and expenses mean nothing to the court. Now, if you cannot stipulate on that we will take care of it in another way.

Mr. Abeles: I understand Mr. Fendler suggested—

The Court: I am not going to argue about what is overhead.

Mr. Abeles: He spoke to Mr. Ward about it and I think they are trying to get together on that.

Mr. Fendler: That is correct.

The Court: That is the only figure I am interested in, gentlemen. Can you agree on that figure?

Mr. Fendler: We can agree, your Honor.

The Court: I am not interested in the amount of gross receipts nor what was spent for overhead and other expenses. I am interested in what the profits were.

Mr. Fendler: If your Honor please, for the same reason that counsel read certain matters into the record and I agreed to them this morning, it is a matter of very easy computation to find out how much was actually out-of-pocket expense and how much is arbitrary bookkeeping charges for [432] overhead. That is the figure I am trying to secure. We feel it is both relevant and competent and they are trying to supply that figure, so I am going to ask that your Honor permit that figure to go into the record along with the other figures and

we will arrive at a figure claimed by Universal to show their profits.

The Court: In other words, there are certain items you claim should not be allowed?

Mr. Fendler: I am not going to stipulate that an item is profit where there is an overhead item of $26,000 which was not out-of-pocket expense. And I think that your Honor should be advised of that. That is all.

The Court: Even in running a law office overhead is a big item in your expense account.

Mr. Fendler: I just want the record to reflect the facts, your Honor. I understand we will have no dispute as to what the facts are.

The Court: Then suppose you proceed.

Mr. Fendler: What is the overhead figure, Mr. Knupp?

Mr. Knupp: I couldn't say. I cannot tell because the figures are presented this way. I will say to the court that I can agree with Mr. Fendler and we will stipulate on it in a written stipulation and file it with the court.

Mr. Fendler: We will either do that or put it in the record. [433]

Mr. Knupp: We do not concede, of course, that the overhead is not a proper charge.

The Court: And you will have some difficulty in convincing the court it isn't a proper charge because I have paid too much overhead in my own time.

Mr. Fendler: Now, those are the only corrections in the record and I assume you are ready to proceed.

Mr. Lewinson: Mr. Fendler, in the interest of accuracy there are a few more detailed corrections and I will call them to your attention later.

Mr. Fendler: We will stipulate to them.

Mr. Abeles: Mr. Hirliman, please.

GEORGE A. HIRLIMAN,

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: George A. Hirliman.

Direct Examination

By Mr. Abeles:

Q. Mr. Hirliman, you came to Los Angeles at my request by airplane from New York? A. Yes, sir.

Q. For what period of time have you been connected in any way with the motion picture industry?

A. Approximately 30 years. [434]

Q. Will you please relate in what capacity from time to time?

A. I started off in the laboratory business. Spent about 10 years in that. Was in production for about eight years and the balance in distribution.

Q. Now, what companies are you with at the present time and in what capacity?

A. I am the president of the International Theatrical and Television Corporation which owns about 10 others who distribute both 16 and 35.

Q. And they buy, do they, they buy re-issue and remake rights to various motion pictures?

A. Yes, they do.

Q. Let me ask you this: You were a motion picture producer for a number of years? A. Yes, sir.

Q. For how many years?

A. Approximately 10 years.

Q. For whom did you produce?

A. Republic, M-G-M, Fox, RKO, Grand National, and independents.

(Testimony of George A. Hirliman)

Q. And I understand your company is considered the largest, if not one of the two largest companies, in the United States that purchase re-issue and remake rights to motion pictures. [435]

A. Yes, sir.

The Court: That is your present business?

The Witness: That is part of my present business, yes.

Q. By Mr. Abeles: What connection have you with these companies that you mentioned that buy re-issue and remake rights to motion pictures?

A. The present company—I have United Screen Attractions. My parent company owns 100 per cent.

Q. Are you an officer of those companies?

A. I am in some of these subsidiaries.

Q. Have you holdings in the various companies?

A. My parent company owns—

Q. Do you have an interest in the parent company?

A. Yes, sir, a substantial one.

Q. I mean, are you a sort of managing director of these companies? A. I am.

Q. For what length of time, sir, have these companies been buying re-issue and remake rights to motion pictures?

A. Approximately three and a half or four years.

Q. Have they bought the re-issue and remake rights to various pictures, Gaumont, British—re-issue rights of British-Gaumont?

A. Not the present company. The one I sold out about eight months ago did. [436]

(Testimony of George A. Hirliman)

Q. Did they buy the rights to the various famous pictures that had been produced by that company, re-issue rights? A. Yes, they did.

Q. Did they also buy the re-issue rights to the famous pictures produced by Selznick International?

A. Yes, seven of them.

Q. Did you buy part of the remake rights to those pictures, too? A. Yes, sir.

Q. All right. Throughout the world, is that right?

A. To the Selznick pictures?

Q. Yes. A. Yes.

Q. And very many famous pictures were involved, were they not? A. Six out of the seven.

Q. Will you name some of them.

A. A Star Is Born, Made for Each Other, Nothing Sacred, Little Lord Fauntleroy, Becky Sharp, which had another title, Vanity Fair, Dancing Pirate, and The Young in Heart.

Q. And Gaumont-British. Will you name some of those.

A. Lady Vanishes, Transatlantic Tunnel, To the Victor.

Q. Was the Lady Vanishes a prize winning story?

A. Yes, sir. [437]

Q. Go on. A. Do you want some more?

Q. How many pictures were there you bought such rights from Gaumont-British? A. 35.

Q. And Selznick, you said you bought how many?

A. Seven.

Q. Now, Harold Roach's pictures. How many pictures did you buy from Harold Roach, the re-issue rights of his comedies?

(Testimony of George A. Hirliman)

A. Approximately 350 to 400 two-reel shorts, and features.

Q. Did those include Laurel and Hardy?

A. Yes, sir.

Q. Did it include the original Topper story with Cary Grant and Constance Bennett?

A. Not the story re-issue rights.

Q. But the picture had Cary Grant and Constance Bennett in it? A. Yes, sir.

Q. And you have purchased re-issue rights to the Samuel Goldwyn Pictures?

A. The company I had eight months ago did.

Q. How many pictures did you buy?

A. 34. [438]

Q. And how much do you approximate the cost of production of those 34 pictures was?

Mr. Fendler: Objected to as immaterial and outside the issues of this case.

The Court: He is qualifying the witness. I am going to admit the testimony.

Q. By Mr. Abeles: Approximately how much?

A. The Goldwyn pictures?

Q. Yes. A. About $100,000,000.

Q. $100,000,000? A. I would estimate that.

Q. And the Roach pictures, how much do you estimate for those?

Mr. Fendler: Same objection.

The Court: Same ruling.

Q. By Mr. Abeles: The cost of producing those pictures? A. $25,000,000.

Q. And how much for the British-Gaumont pictures, the cost of production? A. $30,000,000. [439]

(Testimony of George A. Hirliman)

Now, I understand from Samuel Goldwyn you bought all the pictures made by United?

A. Released through United.

Q. I am sorry, released through United Artists.

A. Yes.

Q. You bought the re-issue rights for the United States and Canada? A. Yes, sir.

Q. Name some of the outstanding ones.

A. Wuthering Heights, Dead End, Stella Dallas, Hurricane, Marco Polo, The Westerner, The Cowboy and the Lady, and all of Eddie Cantor's pictures. In addition to those I mentioned, all the Ronald Colman pictures that were made for Mr. Goldwyn and all the Gary Cooper pictures that were made for Mr. Goldwyn. Wedding Night.

Q. That is Gary Cooper? A. Yes.

Q. And Raffles, the amateur cracksman?

A. Yes.

Q. Did you also purchase the re-issue rights of 23 pictures and re-make rights and story rights from Tiffany? A. Yes.

Q. Productions? A. Yes.

Q. Name some of the pictures. [440]

A. Mr. Antonio by Booth Tarkington, Hotel Continental, The Lost Zeppelin.

Q. And in addition to those pictures there were 35 Ken Maynard westerns? A. Yes, sir.

Q. How about the Ursula Parrott pictures?

A. I don't recall the titles. She is the author of one.

Q. How about Journey's End?

A. Journey's End was included in the deal and we have the negative rights to the original picture.

(Testimony of George A. Hirliman)

Q. How about The Third Alarm?

A. Yes, Third Alarm, too.

Q. How about Harold McGrath?

A. I recall the author but not the title of the picture.

Q. X Marks the Spot?

A. Well, we bought that one and sold it.

Q. Aloha? A. Also Aloha.

The Court: Are you going through all the pictures that were ever made?

Mr. Abeles: Just one more question.

Q. You also bought from Chester Field, you told me, Betty Grable's pictures and Donald Cook's pictures, is that correct? [441]

A. One Betty Grable picture.

Q. And you bought various pictures from R. K. O., I believe, well known pictures? A. Yes.

Q. You have seen it since you have been here—you have seen the picture Movie Crazy—the plaintiff's picture, have you not? A. Yes, sir.

Q. And you also saw the Columbia short, Local Boy Makes Good? A. Yes, sir.

Q. And you saw the sequence in the defendants' pictures, too? A. Yes, sir.

Q. So's Your Uncle? A. Yes, sir.

Q. Now, in your opinion, has the Harold Lloyd picture Movie Crazy and re-issue or re-make value today, or did it—let me put it this way: Did it have any re-issue or re-make value before the use of the sequence—the magician's coat sequence in the defendants' picture So's Your Uncle, in your opinion?

A. In my opinion as to the re-make value—I don't know as to the re-issue value, but it had no value to me.

(Testimony of George A. Hirliman)

Q. Well, as to the re-make value in your opinion would [442] you buy it for re-make?

Mr. Fendler: Objected to on the ground he said he didn't know whether it had a re-make value, and in addition to that it doesn't make any difference whether it had any value to the witness or re-make value at all.

The Court: I think the objection is good as to what was valuable to him. He has expressed an opinion as an expert.

Q. By Mr. Abeles: Now, on the re-make value, in your opinion how much, if anything, would the re-make value of that picture be worth without the use of the sequence by Universal?

Mr. Fendler: Objected to on the ground he said he didn't know.

The Court: We are not interested in what it would be worth without that sequence.

Mr. Abeles: I have to put it both ways.

Mr. Fendler: The objection is he already testified he doesn't know what the re-make value was so he is not qualified to answer the question.

The Court: Is that true?

The Witness: I was assuming you were asking the value insofar as I was concerned.

The Court: We do not want what it is worth to you or whether you would buy it. What we want is your opinion as a dealer as to the value of these pictures for remake and re- [443] issue purposes.

The Witness: Well, the answer to that is no.

The Court: How about the re-make value?

(Testimony of George A. Hirliman)

The Witness: Well, I never buy for re-make purposes. I only buy first for re-issue and if it has re-make value that adds value to me, but if it had only re-make value I would not be interested in it.

The Court: So you don't know?

The Witness: I don't know so far as anyone else is concerned.

The Court: But you have no opinion as to the re-make value?

The Witness: No, sir.

Q. By Mr. Abeles: You said you would not buy the re-issue rights to that picture?

The Court: We are not interested in what he would buy.

Mr. Fendler: That is immaterial.

The Court: We are only interested in your opinion of value.

Q. By Mr. Abeles: In your opinion, then, has the re-make value of that picture been injured in any way by the use of this sequence in the Universal picture?

Mr. Fendler: Objected to on the ground it is immaterial and on the further ground if he doesn't know whether it has a remake value he is not qualified to answer the question. [444]

The Court: I will receive the answer for what it is worth.

The Witness: Would you ask that again?

Q. By Mr. Abeles: In your opinion does the use of this magician's coat sequence in the Universal picture damage the re-make value to that motion picture?

(Testimony of George A. Hirliman)

Mr. Abeles: If your Honor please, the distinction is this: In this case I am asking the witness to testify to a [447] fact.

The Court: Just a moment, counsel. I have ruled. In the first place, it is a collateral matter and in the second place, if the re-issue rights of a picture were sold we do not know whether it was comparable to the picture in issue. It does not mean anything to the court.

Mr. Abeles: I understand. I respectfully take an exception to that.

The Court: You do not have to note an exception to the court's rulings under the new Rules, counsel.

Mr. Abeles: I know that.

Q. After you purchased the re-issue rights to the motion picture Safety Last, were you able to sell it to one single exhibitor in the United States?

Mr. Fendler: That is objected to upon the ground that Safety Last was a silent picture made in 1923 and when the re-issue rights were sold in 1932 we had talking pictures and a silent picture could not possibly be sold as a re-issue in the days of talking pictures. The question is objected to as incompetent, irrelevant and immaterial and outside any issue in this case.

Mr. Abeles: That is why I told your Honor I had to put Mr. Lloyd on the stand first.

The Court: Objection sustained.

Mr. Abeles: Mr. Lloyd testified that that picture had [448] very valuable re-issue rights.

The Court: The picture involved is the only one we are interested in.

Mr. Abeles: That is all, sir.

(Testimony of George A. Hirliman)

Cross-Examination

By Mr. Fendler:

Q. Mr. Hirliman, what is the outstanding company which deals in re-issue rights today?

A. Film Classics.

Q. You are not affiliated with that company, are you?

A. Not for the past eight months.

Q. And this other company with which you are not affiliated is the one that has acquired these various re-issue rights in the pictures to which your attention has been directed, is that correct?

A. Will you say that again?

Q. I say it is Film Classics which acquired the interests—acquired the re-issue rights in these pictures which you have made, is that correct?

Mr. Abeles: I object to it on the ground the witness testified he was with the company that acquired them and he later sold the company.

Mr. Fendler: I will connect it up, your Honor.

The Court: Will you read the question.

(Question read.) [449]

Mr. Fendler: If it is unintelligible I will withdraw the question.

Q. It is Film Classics which acquired the re-issue rights to the pictures that you have named and not this International Theatrical and Television Company?

A. Of the first four mentioned that is so. All thereafter were acquired in the name of International.

(Testimony of George A. Hirliman)

Q. Well, now, doesn't the Film Classics, Inc., own the Goldwyn pictures?

A. I said the first four deals which includes Gaumont-British, Selznick and Goldwyn.

Q. Those are the big ones? A. That is right.

Q. Now, Mr. Alperson formed Film Classics, did he not? A. No, sir.

Q. Mr. Alperson is the present general manager of Film Classics, is he not? A. I think so.

The Court: Is Film Classics the present company?

The Witness: That is the company.

The Court: The original company?

The Witness: Yes.

The Court: What is the business of that company?

The Witness: Re-issuing old pictures. [450]

The Court: And has that developed into quite a business?

The Witness: With that company, yes.

The Court: But there are other companies in the same business?

The Witness: Smaller ones, yes.

The Court: That are engaged in buying and selling re-issued pictures?

The Witness: Yes, sir.

The Court: Re-issue rights.

The Witness: Yes, sir.

The Court: And there is a demand for those re-issues; otherwise you would not buy them?

The Witness: That is right.

The Court: And when you re-issue them do you re-sell them or do you redistribute them yourselves?

(Testimony of George A. Hirliman)

The Witness: Generally we distribute them ourselves.

The Court: So then you buy them for the purpose of redistribution?

The Witness: Yes, sir.

The Court: It is true then that pictures that have seen their day, in a sense, are re-issued and are redistributed to your advantage?

The Witness: If they are not dated by either wardrobe or costumes or technique. [451]

The Court: But you expect in buying re-issue rights of pictures to make a profit?

The Witness: Yes, sir.

The Court: And you buy them with that in view?

The Witness: Yes, sir.

The Court: And as you say there are others engaged in the same business?

The Witness: Yes, sir.

The Court: So it has been a business that has developed out of the moving picture industry?

The Witness: That is correct.

The Court: With a view on the part of the producing companies to salvage what they can from them after originally being issued?

The Witness: Yes, sir.

The Court: So in a sense you act as sort of a salvage man?

The Witness: That is right.

The Court: You bring in some additional profits to the owners of those films?

The Witness: Yes, sir.

The Court: How long has that practice been going on?

(Testimony of George A. Hirliman)

The Witness: There has always been a certain amount of re-issue business but it became more profitable and more common with the war when there was a shortage of film and pic- [452] tures.

The Court: As a matter of fact, isn't there a demand for that type of pictures in certain theatres?

The Witness: If they are of the classic type. I mean a picture like Wutherin Heights or Lady Vanishes. They could probably be issued four different times.

The Court: Aren't there some theatres that make a business of showing only old pictures over again?

The Witness: What they call the art theatres, which only play the classics or foreign pictures or things like that. For instance, a picture which I referred to, Lady Vanishes, is presently playing in New York at Little Carnegie, which is the finest art theatre in New York. And I am sure I am safe in saying that is probably the eighth time it has played there.

The Court: Well, aren't there some theatres that are still displaying some of the old silent pictures?

The Witness: Just as a sort of—like they go back so far they are so old they are funny.

The Court: They are sufficiently funny to attract considerable business?

The Witness: There is a very limited audience for that sort of thing. They are usually gagged with sound. Sound has been added to them with gags.

The Court: The producers always retain their films [453] after they have had their run throughout the country? They store them in fireproof vaults as a rule, do they not?

(Testimony of George A. Hirliman)

The Witness: You mean the regular run of the mine picture.

The Court: Yes.

The Witness: Yes, sir.

The Court: And that is the stockpile from which you select certain pictures that you feel have re-issue value?

The Witness: Well, it doesn't exactly work that way. The large producing companies very rarely or would not sell their pictures for re-issue to a smaller company like I am. It would only be individual producers. Frankly, the whole thing came about in the sense of outright sales because they could take capital gains and realize that much out of them, but a big company would never sell us pictures.

The Court: You mean they would not sell them in order to acquire capital gains?

The Witness: An individual would who had a picture and he had gotten his run out of it and gotten his money. He would sell for whatever the residual value was, even for a comparatively small amount of money in relation to its cost because he could keep 75 per cent of it.

The Court: Well, whatever a picture sells for is only a small part of its original cost?

The Witness: Very small. [454]

The Court: Do you have any rule of thumb that you go by in purchasing pictures, or is it just a question of horse trading?

The Witness: I could give you the high and low of what I bought in re-issue.

The Court: Is it simply a question of horse trading?

(Testimony of George A. Hirliman)

The Witness: It is a question—there is no rule of thumb. It is a question of quality of the picture. We paid Mr. Goldwyn probably—

Mr. Fendler: Just a minute—well, go ahead.

The Witness: We paid Mr. Goldwyn probably 50 times what we paid for the Tiffany pictures.

The Court: Then really when you want a picture it is simply a question of horse trading?

The Witness: Yes, sir.

The Court: Dickering back and forth?

The Witness: Yes.

The Court: You find a picture which you feel has a re-issue value and then you try to buy it?

The Witness: Yes, sir.

The Court: Now, do you deal directly with the owners of those films or do you generally deal through brokers?

The Witness: Generally directly with the owner.

The Court: But there are brokers who engage in that business? [455]

The Witness: Not that I know of.

The Court: That is all.

Q. By Mr. Fendler: Now, Mr. Hirliman, you testified that the re-issue business became quite in vogue after the war because of the shortage of film and stock and so on. That is during the years 1943 and 1944 and 1945 it really began to come into its own, isn't that right?

A. Yes, sir.

Q. And another reason for that would be, would it not, that enough time had elapsed from the introduction of talking pictures in 1930 to allow a sufficient span of time to go by that there might be a new generation of

(Testimony of George A. Hirliman)

theatre goers who had not seen the picture formerly, isn't that correct? A. Yes, sir.

Q. Now, you did not mean to testify that comedies do not have substantial re-issue rights, did you?

A. I don't recall that I did. I don't recall being asked that question.

Q. Well, I understood you to say something about comedies being dated. One of the outstanding comedies was Hal Roach's Topper? A. Yes, sir.

Q. That was a comedy, wasn't it? A. Yes, sir.

Q. And the estimated gross on Topper on re-issue in [456] this country alone is $250,000, isn't it?

Mr. Abeles: Your Honor, I object to that as incompetent, irrelevant and immaterial. I did not bring out any figures at all because of your Honor's ruling. I purposely kept away from that.

The Court: He is simply testing the qualifications of the witness.

Mr. Abeles: I did not ask about comedies purposely. I purposely kept away from stories. I said where they have an outstanding story like Topper.

The Court: This is a comedy involved here, isn't it?

Mr. Abeles: Yes.

The Court: The court is interested in this witness' testimony as to whether there is any re-issue value in a comedy. That is really what I am interested in. Let me ask this question: Comedies have re-issue value the same as any other type of picture, do they not?

The Witness: It all depends, your Honor, on what they were based on.

(Testimony of George A. Hirliman)

The Court: Well, if they are still funny and make people laugh and people want to see them they are still valuable, aren't they?

The Witness: Would you like me to enlarge on that and explain what I mean?

The Court: Yes. [457]

The Witness: The picture Mr. Fendler refers to, Topper, is from a very famous novel by a very famous author whose books today are still in great demand. When I referred to the other type of picture—I don't recall that I used the word "comedy" but if I did I meant a picture that was made up of a lot of situations and there was no original famous play or story or stage play or something which would more or less live forever. I don't think Topper comes into the classification of a comedy in the sense of a situation comedy. That is a very famous story and the best answer to it is that to my recollection Mr. Roach continued to make Topper series of the same author for, I don't know how many more, but I think two or three more.

Q. By Mr. Fendler: Now, you don't wish to testify, do you, Mr. Hirliman, that the only valuable motion pictures are those which are predicated or based upon plays which have been produced, or novels which have been published, do you? A. No.

Q. In fact, some of the most famous moving pictures, both in the silent and talking picture days, have been originals which have been developed at the studios, isn't that right? A. And were re-issued?

Q. I am not talking about re-issue.

A. I am not testifying on new pictures. I am testify-[458] ing with reference to re-issues.

(Testimony of George A. Hirliman)

Q. You testified, Mr. Hirliman, the reason Topper was valuable, as I understood your testimony, was because it was based upon a novel which even is being sold today. A. That is right.

Q. And your testimony was that the reason that that was valuable was because it was based upon a novel?

A. That is one of the reasons.

Q. Now as a matter of fact some of the most valuable moving pictures have been developed from original stories, haven't they? A. Yes.

Q. And in fact studios have paid as high as $100,000 for an original story?

Mr. Abeles: Object to that.

The Witness: I don't know about that.

Mr. Abeles: That has nothing to do with re-issues.

The Court: I don't know what you are gaining by this cross-examination. I have heard this witness' testimony.

Mr. Fendler: If your Honor please, I would like to develop further the re-issue situation.

The Court: All right, proceed.

Mr. Fendler: I shall not ask any further questions along the previous line.

The Court: Let us get down to the issues. [459]

Q. By Mr. Fendler: Now, there are a number of comedies which have been remade several times, are there not? A. I don't recall them at the moment.

Q. Ruggles of Red Gap. Does that refresh your recollection?

The Court: Mr. Fendler, you objected a moment ago because you said this man was not qualified to testify with reference to remakes.

(Testimony of George A. Hirliman)

Mr. Fendler: I am not asking about the value of remakes. I am attacking his testimony that comedies can only be shown once, in effect, and in order to develop the fact that some of the most successful—

The Court: Proceed.

Mr. Fendler: Will you read the question.

(Question read.)

The Witness: You have the same situation there as you have with Topper. You have another famous author.

Q. By Mr. Fendler: Have any changes been made in the two or three different productions of Ruggles of Red Gap from the original author?

A. I wouldn't know—I didn't see it.

Q. Well, it is a fact, is it not, Mr. Hirliman, that the remake of a comedy can be much more sucessful and profitable financially than the original?

Mr. Lewinson: That is objected to. [460]

The Witness: It isn't to my knowledge.

Mr. Lewinson: That is objected to.

Q. By Mr. Fendler: Now, isn't it a fact that the remake of Ruggles of Red Gap with Charles Laughton grossed approximately twice as much as the original production of Ruggles of Red Gap?

The Court: Just a moment, counsel. I am not going to permit you to have a discussion concerning these various pictures. If I do I will have to spend the next two weeks at the studios looking at them.

Mr. Fendler: May I state to your Honor that the question in your Honor's mind has apparently been, from the start of the case, whether the values placed on the reissue rights and remake rights by Harold Lloyd did not have too many ciphers. Now we desire, if your Honor

(Testimony of George A. Hirliman)

please, to show that the figures which Lloyd placed on the re-issue and remake rights are ultra-conservative and that judged by other comedies have done, both on re-issue and remake, that there are not too many ciphers involved.

The Court: Counsel, do you ever expect to get such an admission from opposing counsel's experts?

Mr. Lewinson: This witness has not testified with reference to remake values.

The Court: I realize that. I also realize that experts are in a sense associate counsel in a case and I do not expect [461] counsel to put an expert on the witness stand unless he knows what he is going to testify to in advance. Otherwise they would not put them on. I understand that thoroughly from my own experience as a practicing attorney. I feel that we are going to simply have a conflict of testimony that the court is going to have to reconcile in its own mind.

Mr. Fendler: May I offer the evidence, if your Honor please? Now, I propose to prove by this witness that the figures which Mr. Lloyd gave, judged by the standard of the estimated gross profits on re-issues of these pictures which this company acquired—

The Court: Counsel, can't you see the court's viewpoint after everything I have said? I will say it again. These figures of $100,000, $200,000 are entirely out of line. You might as well mention the national debt.

Now, if you want to proceed along the same line, I will give you all of the leeway you want. You may fill up the record with it and make it as large as you want. I will sit here and listen, but as far as having any material weight with this court is concerned, it will not.

(Testimony of George A. Hirliman)

I have heard this witness' testimony. I have heard his qualifications. He is brought here by opposing counsel to testify that they had no value or they would not have brought him from New York. They knew what he was going to testify to. The witnesses you put on will testify as to certain [462] values. You would not put them on unless you knew they were going to so testify.

Mr. Fendler: May I ask three final questions, your Honor?

The Court: You may, yes.

Q. By Mr. Fendler: The consideration paid by your company to Samuel Goldwyn was $1,500,000 or thereabouts, for the re-issue rights of the 30 odd pictures which you bought—of which you bought the motion picture re-issue rights, is that right?

Mr. Abeles: I object to it on the ground I never brought that out.

The Court: The witness so testified.

Mr. Abeles: I never brought that out. I could show we bought some for $25,000.

The Court: I don't know what the figures were but he gave a long list of figures.

Mr. Abeles: Those were production costs of the original pictures. I never went into the figure that he has given now. Now, I will have to go through all of the figures and bring that out.

The Court: Proceed, gentlemen.

Q. By Mr. Fendler: What is the answer?

A. The figure is $1,350,000.

Q. $1,350,000 for the Goldwyn pictures? [463]

A. Yes.

(Testimony of George A. Hirliman)

Q. Now, with that purchase from Goldwyn—you say that was made by Goldwyn partially to take advantage of the capital gains tax?

A. No. That is not an outright purchase. I said some producers do that.

Q. He just leased the pictures to you, is that correct?

A. Right.

Q. And you paid him $1,350,000 for the lease?

A. 35 pictures.

Q. And you paid Selsznick $100,000 for the re-issue rights to some of the Selznick pictures?

A. The outright purchase.

Q. You purchased some of the Selznick pictures for $100,000 or more, is that correct? A. Right.

Q. And the estimated gross on the re-issue of Topper is in excess of $250,000 in this country alone, is it not?

Mr. Abeles: Object to that.

Mr. Fendler: On the re-issue.

Mr. Abeles: How would he know that?

The Court: I don't know. You and he both are pretty good testifiers.

Mr. Abeles: It is just opening all of this up. Go [464] ahead.

The Witness: That figure is correct.

Q. By Mr. Lewinson: That is the third question, Mr. Fendler.

Mr. Fendler: Well, I may not confine myself to three.

Q. And the estimated gross on the re-issue of Topper is another $100,000, is it not?

Mr. Abeles: The profits he made are immaterial. The question is what he paid for the rights. If he made $1,000,000, what does that mean? What difference does that make. I do not see that it has anything to do with it.

(Testimony of George A. Hirliman)

The Court: Counsel, as far as these figures are concerned I am letting him build up his record because when we get through with this case neither one of you are going to be satisfied. I will let you build up your record but I know that I cannot satisfy either side in any decision that I render. I have expressed myself several times with reference to this matter. It has no weight with me, because what one picture might bring is no indication of what another picture might produce. If counsel wants to bring in these big pictures I will permit him to do so and I will give you the same privilege. Proceed.

Q. By Mr. Fendler: Now, Mr. Hirliman, when pictures are re-issued by Film Classics or by any of the other organizations or by the original producers today, they are not re- [465] issued as revivals or advertised as revivals, are they? A. Sometimes.

Q. Well, isn't it the custom to advertise and exploit the re-issue of a picture by using a brand new publicity campaign and with ads which do not reflect the fact that the picture was made 10 years back?

A. That is not true in the case of the major companies.

Q. Well, when it comes to Film Classics, which bought all of these Goldwyn and Selznick and other pictures, their publicity and paid advertising does not reflect that the re-issue is a revival of an old picture?

The Court: Counsel, why should I be interested in that? What does that tend to prove or disprove in this case? It does not tend to disprove or prove anything.

Q. By Mr. Fendler: Now, do the major companies re-issue their own productions at the present time?

A. In several instances they do.

(Testimony of George A. Hirliman)

Q. And when a major company re-issues its own productions that production is distributed by the same distributing organization with the exchanges throughout the country which distributed the picture originally, is that correct? A. Yes, sir.

Q. And the same accessories, press books, mats, etc., are still used in the new campaign, is that correct?

A. Not necessarily. [466]

Q. Can be either one or the other?

The Court: I don't care about that one way or the other, counsel. I am interested in Mr. Abeles' and Mr. Fendler's knowledge of the industry but I do not want to have what might be called a quiz course here with the intention of arriving at a certain objective. I am not interested in what you know about the details of the business. I have stated before and I will state again that I am trying to determine damages. I would like to know what the picture in controversy was worth before the defendant's picture was exhibited and what it was worth afterwards. Those are the things I am interested in. Whether I am right or wrong I don't know, but as you stated in your brief this particular situation has not been brought up in any other case.

Mr. Fendler: I will ask no further questions then.

Mr. Abeles: I have just a couple of questions.

Redirect Examination

By Mr. Abeles:

Q. You testified—rather Mr. Fendler brought out these enormous sums which were paid for the re-issue rights for pictures that are based upon novels and stage plays of famous stories. Now, let us get to the comedies,

(Testimony of George A. Hirliman)

which I did not ask you about. What did you pay for the 411 Hal Roach comedies? [467]

Mr. Fendler: Objected to as immaterial. The purchase of re-issue rights to two-reel comedies produced in silent picture days 25 years ago can throw no light on this.

The Court: Objection overruled.

Q. By Mr. Abeles: What was the type of picture you bought from Hal Roach?

A. In the first place they were all sound.

Q. How many Laurel and Hardy pictures?

A. You are talking about features or shorts?

Q. Features.

A. Eleven features of which seven were Laurel and Hardy features.

Q. And one was Topper? A. Yes.

Q. And there were 400 two-and three-reel shorts?

A. Yes, sir.

Q. What did you pay for those?

Mr. Fendler: Objected to on the ground the purchase of sound pictures—

The Court: Just a moment, counsel. I am going to have to invoke a rather strict rule here. If you have anything to say, please direct your remarks to the court.

Mr. Abeles: I always do that.

The Court: I call counsel's attention to our previous session which became more or less stormy because counsel con- [468] tinued to argue back and forth. The objection is overruled.

The Witness: Will you ask the question again, please?

Q. By Mr. Abeles: How much did you pay for the 411 pictures? A. $80,000.

(Testimony of George A. Hirliman)

Q. Now, in your opinion—I should really bring this out—in your opinion is the sequence, the magician's coat sequence in the Harold Lloyd picture Movie Crazy a material factor to that picture?

A. No, sir, it is not.

Mr. Fendler: Just a moment. I object to that as immaterial.

The Court: Counsel, he can testify it should have been left out of the picture, but I saw the picture and he can testify that way if he cares to, but as far as this court is concerned you are wasting your time in bringing out testimony that that sequence was of no consequence in that picture. I saw the picture and I have my own views as to the value of that sequence.

Mr. Abeles: That isn't what I am bringing out. Give me a chance. I did not ask that question. I said was it a material factor in the picture. Was it related to the story in the picture? Does it carry through? Let me ask him that. Give me your answer on that, Mr. Hirliman.

Q. In other words, in your opinion, is that sequence [469] forced into the picture or is it worked through into the picture in the regular line of the picture?

A. I can't answer that question yes or no. I believe that the sequence could be left out of the picture and the story value would not be materially affected.

Q. Why?

A. Because, to be specific about it, when you are at that sequence the character, Harold Lloyd, does not meet with the head of the studio, which would have made good sense at the end of the story, and when he promotes him and gives him the job he doesn't even know about it. It

(Testimony of George A. Hirliman)

could be left out of the picture but he still could be rewarded at the end and get his job and so forth and nobody would ever know whether that was in there or not.

Q. You mean there is nothing connected with that sequence with what was going on between Harold Lloyd and the producer? A. Yes, sir.

Q. Nothing to show the wife ever told the producer and the producer ever found it out?

A. That is right.

Q. Now, to your knowledge, and this is the last question, to your knowledge do you know of any picture containing a secondary story—that is a story that is not a famous or outstanding story, whether original or otherwise, [470] where the material was written for a comedian, situation material written for a comedian like Lloyd or Chaplin or Buster Keaton that was ever remade in one single one? A. No.

Mr. Abeles: That is all. [471]

Recross Examination.

By Mr. Fendler:

Q. Would it surprise you to know that Danny Kaye is now acting in a production by Goldwyn of a remake of Harold Lloyd's Milky Way?

A. That also was taken from a play, wasn't it?

Q. Was the motion picture the same as the play?

A. I don't remember.

Q. You don't remember whether it was or not?

A. No, sir.

Mr. Fendler: That is all.

The Court: We will take a recess at this time, gentlemen, until 2:00 o'clock.

(Whereupon, at 11:55 o'clock a. m., a recess was taken until 2:00 o'clock p. m. of the same day.) [471]

Afternoon Session. 2:00 P. M.

The Court: You may proceed, gentlemen.

Mr. Abeles: If your Honor please, I would like to offer in evidence lines 19 to 26 inclusive of page 49, and lines 1 to 3 inclusive on page 50 of the deposition of

JEAN W. YARBROUGH.

Mr. Fendler: That is so stipulated, and I suggest you read it into the record.

The Court: What is it you are offering in evidence?

Mr. Fendler: Mr. Abeles is offering in evidence a portion of the deposition of Jean Yarbrough, the producer of the Universal motion picture So's Your Uncle, which is a deposition on file in this case. I have no objection to that being received in evidence. I think it is a proper part of the case.

The Court: Very well, you may read it into the record.

Mr. Abeles: This is a question by Mr. Fendler:

"Q. Now, were you aware of the fact, Mr. Yarbrough, that this magician's coat sequence had, in substance, been used in a previous motion picture?

"A. I was told by Mr. Bruckman that material of this nature had been used two or three times, over a period of years, previously. [472]

"Q. Did he tell you in what pictures?

"A. He told me that in some Columbia picture that he had been associated with they had done something along that line and that some years back Lloyd had done something of that nature."

Now, just one other thing and then I am through. The next is on page 63. I would also like to offer in evidence part of Mr. Bruckman's deposition, starting on line 17 of page 63, and ending on line 24 on page 64.

This is only for the purpose of qualifying Bruckman, to show his qualifications. The reason I am not bringing him here is because his mother is very ill.

Mr. Fendler: I have no objection to your reading it into evidence, Mr. Abeles.

The Court: I would prefer you to read it because I want to get the continuity of it along with the rest of the evidence.

Mr. Abeles: "Q. How long have you been engaged in some phase of the motion picture business?

"A. Since 1919.

"Q. Will you, for the purpose of the record, outline your moving picture experience.

"A. As a sports writer on the Los Angeles Examiner, I did free-lance title work on the side during 1919, 1920 and the early part of 1921. [473]

"Q. When you speak of free-lance writing, you mean writing the subtitles for what were then silent motion pictures?

"A. That is correct.

"Q. Go right ahead.

"A. In the spring of 1921, I left the Examiner and went to work as a gag man and writer for Warner Bros. In the fall of the same year, I went to work, in the same capacity, with Buster Keaton.

"I remained with Keaton for probably a year. Then I went with Metro Pictures for a brief period; then back with Buster Keaton for possibly another year. From Keaton I went to Mack Sennett, also as a gag man and

writer. From Sennett's I went to the Harold Lloyd Corporation as a gag man and writer. I was with Harold Lloyd for possibly a year and a half, when I returned to Buster Keaton. From Buster Keaton I went with Monty Banks Productions; from there to the Hal Roach Studio, as director and writer. From the Hal Roach Studio I went to Metro-Goldwyn-Mayer as a writer. From there I went to the Harold Lloyd Corporation as a writer. I remained with the Lloyd Corporation as a writer and later director, with certain intervals at other studios, until some time in 1933, I believe. From there I went to Mack Sennett Pictures, then to Columbia, and worked alternately between Columbia and other studios, including the [474] Harold Lloyd Company, until 1938. In 1938, I worked with Columbia steadily until coming to Universal in the early part of 1943."

The Court: That is from the deposition of the defendant Bruckman?

Mr. Abeles: Yes, sir, defendant Bruckman.

Mr. Fendler: I have a question and answer on cross examination in that deposition I would like to read. It is on page 69, line 17.

Mr. Lewinson: There was no cross examination on the deposition. You took the deposition, Mr. Fendler.

Mr. Fendler: This is being read because of the deposition of Mr. Yarbrough, which has just been read into evidence.

Mr. Abeles: You can read any part of it you like.

Mr. Fendler: Very well:

"Q. What was the source of your material?

"A. I told Mr. Yarbrough at the time that I had done this in a Columbia picture a couple of years ago, at which time it had been suggested by and patterned after a se-

quence we had done in the Harold Lloyd motion picture Movie Crazy, as I remember it."

He testified to that on his examination here in court.

Mr. Abeles: Yes.

Mr. Fendler: I have one further witness, if your Honor please. [475]

The Court: Have you any further witnesses?

Mr. Abeles: No, we haven't. There is only one thing unless we can stipulate that shortly after receipt of the notice of this communication of March 20 that I offered in evidence—I forget the number—

The Clerk: Exhibit G.

Mr. Abeles: We sent out the—the defendant Universal Pictures Company sent out instructions to all their exchanges to stop the exhibition of the picture until this matter had been determined.

Mr. Fendler: I will stipulate such instructions were given. I will not stipulate the instructions were complied with.

Mr. Abeles: To the best of our knowledge they were complied with.

Mr. Fendler: You do not contend the plaintiff is not entitled to an injunction, do you?

Mr. Abeles: No.

Mr. Fendler: Very well, we will so stipulate. Shall I call my witness?

The Court: Yes.

Mr. Fendler: Mr. Botsford, will you take the stand. [476]

A. M. BOTSFORD,

called as a witness by and on behalf of the plaintiff in rebuttal, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: A. M. Botsford.

Direct Examination.

By Mr. Fendler:

Q. Have you at any time been associated or affiliated with the motion picture industry, Mr. Botsford?

A. Yes.

Q. For how many years?

A. Approximately 25 years—over 25 years.

Q. Now, will you state to the court whether or not you have ever had motion picture contact with the distribution and exhibition of motion pictures?

A. Yes, sir. I entered the motion picture business as a publicity man for Paramount Pictures. Publicity then was—from there to distribution and then advertising manager for Paramount Pictures, which was under distribution. From there I became advertising manager for Paramount-Publix Theatres.

Q. That is a chain of theatres owned by Paramount-Publix, Inc.? A. Yes, sir.

Q. They are exhibitors? [477] A. Yes.

Q. And that chain consisted of how many theatres?

A. Approximately 11 or 12 hundred theatres.

Q. Eleven or 12 hundred? A. Yes, sir.

Q. All right. Will you go on, please?

A. From that point I was—I became head of the editorial board at the Paramount Studio in Hollywood

(Testimony of A. M. Botsford)

and went into production, distribution, exhibition and then production.

Q. And what was your connection with the production end of the business at Paramount?

A. First I was head of the editorial board for a matter of a couple or two years, and then I became executive assistant to the head of the studio.

Q. And for how long a period were you executive assistant to the head of Paramount Studios or successive heads?

A. Successive heads? Yes, approximately five years.

Q. For approximately five years? A. Yes, sir.

Q. That was during the 30's?

A. That was during the 30's, yes.

Mr. Lewinson: May I interrupt and suggest we get some terminal dates.

Mr. Fendler: I will be glad to. [478]

Q. By Mr. Fendler: Will you state the approximate period of time you were associated with the distribution of Paramount Pictures in New York?

A. 1917 until I became advertising head of Publix Theatres, which was in 1926 and '27.

Q. How long did you remain with Paramount-Publix Theatres?

A. Until 1929. This is to the best of my recollection.

Q. Then about 1929 did you come out to the West Coast?

A. I first operated for the Paramount editorial board in New York for a matter of about a year and then was transferred to the coast in 1931.

(Testimony of A. M. Botsford)

Q. Now, how long did you remain on the editorial board out here in Los Angeles?

A. To the best of my recollection it was from 1931 until possibly 1939.

Q. And then for the next five years you say you were executive assistant to the head of Paramount?

A. From 1933 until 1936 I was executive assistant to the head of the Paramount Studios.

Q. That was for a succession of heads, is that correct?

A. That is correct.

Q. Then in 1936 what did you do? [479]

A. In 1936 I was made a producer of pictures.

Q. And approximately how many pictures did you then produce at Paramount?

A. During my regime there I produced approximately 15 or 16 pictures. I have forgotten the exact number.

Q. Then when did you leave Paramount?

A. I left Paramount in 1941.

Q. Now, during the entire period that Harold Lloyd pictures were being distributed by Paramount, that is, from 1929 until 1941 I think you testified, you were connected with Paramount, is that correct?

A. Yes, that is correct.

Q. And then in 1941 what did you next do?

A. In 1941 I became the advertising head of 20th Century-Fox Films with headquarters in New York.

Q. And were you then again in the distribution and exploitation end of the game? A. Yes, sir.

Q. And then after terminating your connection with 20th Century-Fox what did you next do?

A. I became the managing director of the A. & S. Lyons Agency.

(Testimony of A. M. Botsford)

Q. As managing director of the Lyons Agency—are there various departments of that agency?

A. Yes, sir. They have to do with the sale of talent, [480] stories, radio, to the various buyers.

Q. Do they also have anything to do with the sale or resale of motion picture rights?

A. We in that agency try to interest studios in the possible sale of motion picture rights but I don't remember of any sales that we made.

Q. But at least—being actually made—but at least you were familiar with the general market conditions during the years 1942 and '43 and up to date, is that correct? A. Definitely.

Q. Now, Mr. Botsford, have you at my request in the last two days examined the—inspected the motion pictures Movie Crazy, So's Your Uncle and the Columbia short Local Boy Makes Good? A. Yes.

Mr. Fendler: If your Honor please, I would like to turn the witness over to your Honor for any questions that your Honor might wish to ask.

The Court: I am interested in knowing what he knows about sales for re-issue or remake purposes.

Q. By Mr. Fendler: Very well. Now, Mr. Botsford, I will ask some more qualifying questions. During the course of your regime at Paramount, between 1930 and 1941, did Paramount remake any motion pictures? [481] A. Yes.

Q. Comedies or otherwise? A. Both.

Q. Will you state to the court—question withdrawn. In considering the—question withdrawn.

(Testimony of A. M. Botsford)

Will you name some of the comedies that were remade at Paramount during the period that you were executive assistant to the head of the studio?

Mr. Abeles: I object as not the proper form of proof. We concede it has been testified to that may types of pictures have been made, remade, based upon novels and books but that is no criterion of what this picture would be worth.

Mr. Fendler: I will qualify him.

The Court: I think the objection is good.

What do you know about the custom in the industry with reference to the disposition of films that have run their course and have been put away in storage, as to whether or not they are ever brought out and used again?

The Witness: Yes, I think they are. Of course the negatives are put in the vaults and from time to time some producers or the studio heads get the idea that that picture, in looking over the catalog of pictures they made, would make a good picture to remake. In fact, they are struggling for [482] stories all the time and one of the things they actually hire people to do is go over their catalog of pictures and see if there isn't some picture that was formerly made that could be made again.

The Court: And do you know of any sales of pictures for that picture, not naming the picture or the price?

The Witness: That experience is confined to Paramount. I myself as head of the editorial board engaged people to go over the catalog looking for stories that have been made and, of course, there was no sale because Paramount made it. It owned the story. We did have a long list of pictures which we were willing to sell to other producers.

(Testimony of A. M. Botsford)

The Court: Did you have lists of pictures that other producers were willing to sell?

The Witness: That we made ourselves?

The Court: No, that other producers would want. Do other producers have lists of pictures for sale?

The Witness: Yes, sir.

The Court: Is that more or less a common practice?

The Witness: That is a common practice, yes.

The Court: What do you know about re-issued pictures after they have been stored away for a number of years?

The Witness: The same thing applies. The distribution department would begin to speculate what pictures had been formerly made that would make re-issue at that particu- [483] lar time, or whatever particular time it was. Suppose they decided The Virginian would be a good picture to re-issue or they would decide the Sign of the Cross would be good for re-issue, the market was ripe for that type of thing.

The Court: How long would you have to hold a picture before you could re-issue it?

The Witness: That would be difficult to say. I think five, six or seven years. I don't think there is any particular time—any arbitrary fixture of time.

The Court: Would the re-issuance of it be governed any by the cost of the original picture and its financial success?

The Witness: That would enter into it, I would think, yes.

The Court: Would you take that into consideration?

The Witness: Yes.

(Testimony of A. M. Botsford)

The Court: In other words, if a picture on its original issue had not been a financial success you would not re-issue it?

The Witness: That is correct.

The Court: You would not be interested in re-issuing it?

The Witness: That is correct.

The Court: Do you have any knowledge of any picture, without naming them or the amount of the sale of those pictures, do you have any knowledge of such sales to third parties? [484]

The Witness: I know of the sale of, yes, one in particular. There are probably others. For instance, Paramount sold some to 20th Century Fox—Blood and Sand. I am not sure of the figures but I think it was something around $100,000.

Mr. Abeles: I move to strike that out, if the court please.

The Court: That portion of the answer will be stricken. Then the purpose of retaining these old films is three-fold: One, possible re-issue, possible re-make and possible sale to a third party?

The Witness: Correct.

The Court: You may proceed.

Q. By Mr. Fendler: Now, after having witnessed the picture Movie Crazy starring Harold Lloyd, do you have an opinion as to the reasonable market value of the re-issue rights of that motion picture as of December 1, 1943, prior to the release or distribution of the Universal picture. Just answer yes or no.

A. Yes, I have.

(Testimony of A. M. Botsford)

Q. Will you state what, in your opinion, was the fair market value of the re-issue rights of that motion picture as of that date?

Mr. Abeles: I object on the ground the witness is not properly qualified for that answer. It is not the proper form [485] of proof to establish the value of the re-issue rights of that picture.

Mr. Fendler: We submit it, your Honor.

The Court: Just wherein do you claim he is not properly qualified?

Mr. Abeles: He has not dealt in re-issue or re-make rights. He named a couple of famous stories—Sign of the Cross, Blood and Sand. Of course we know they are famous stories, but he has not shown he had anything to do with comedies of this nature or pictures of this nature. How can he get up there and coldly say what he thinks the re-issue rights are worth?

The Court: Doesn't that go to the weight of the testimony?

Mr. Abeles: I had the man that actually sold the Harold Lloyd picture and I tell your Honor now he bought it for $3,500.00 and he lost money on it. He could not get an exhibitor to take it and they took it back at $1,000 loss. I wanted to put that in. That is the best positive evidence of this kind. This certainly has no bearing at all. He is not qualified, I mean. Here is a picture, at least a Lloyd picture, that I couldn't get in.

The Court: The trouble is, counsel, when you start talking about different pictures it is like talking about the value of this building as compared with the value of the

(Testimony of A. M. Botsford)

City [486] Hall across the street. It depends on the picture.

Mr. Abeles: That is right.

The Court: Here is a man with long years of experience in the industry. Doesn't your objection go rather to the weight to be given to his testimony than anything else?

Mr. Abeles: I say it goes both ways. Of course my point is, as your Honor said, it is not a—in other words, a similar article of property is not the proper basis of establishing value.

The Court: I think if the two pictures were comparable that would be one thing, but when you simply name two different pictures that does not mean they are comparable.

Mr. Abeles: That is right, sir. It depends upon many factors the same as a play. I can offer a play on one side of the street and maybe have a big failure and your Honor would open it on the other side and have a howling success.

The Court: I know if I opened one on either side what would happen.

Mr. Abeles: That has been proven over and over again. I know a picture called Wilson that 20th Century Fox spent three and a half million dollars on and only got back $2,000,000, but the public thinks they made a lot of money on it. That has happened a lot of times. That is no criterion.

Mr. Fendler: We submit he is qualified.

The Court: I think the witness is qualified. You may [487] answer the question.

(Testimony of A. M. Botsford)

Q. By Mr. Fendler: What in your opinion was the value of the re-issue rights as of December, 1943, of Movie Crazy?

A. Well, I will have to qualify that by saying that my knowledge of that comes from the fact that I know that the distribution department would say to us unless we can make $100,000 there is no use of re-issuing it. Now, in the case of Movie Crazy I would say somewhere around that figure.

Q. Do you have an opinion as to the value of the re-make rights of Movie Crazy as of that date?

A. Yes.

Q. What in your opinion was the value or what would have been the reasonable value of the re-make rights of Movie Crazy as of that date?

Mr. Abeles: We respectfully make the same objection.

The Court: Same ruling.

The Witness: I would say from 125 to 150 thousand dollars. I can qualify that if you like.

Q. By Mr. Fendler: Make any statement you want.

A. It is based on the fact—it depends on who wants it and for what purpose they want it. In the case of Paramount, with which I am of course most familiar, there is a boy named Eddie Bracken who is a young Harold Lloyd. They might very well pay $150,000 for a picture that Harold Lloyd [488] had once made for an Eddie Bracken starring vehicle. They would do the same thing for Danny Kaye. The value depends on who is going to buy the picture and for what purpose they want it.

(Testimony of A. M. Botsford)

Mr. Abeles: If your Honor please, I move to strike out the testimony on the ground it has been established that in the case of Danny Kaye he played in a very famous stage play. In this case Movie Crazy—there is no comparison at all. The witness is merely supposing that if Paramount might decide to make a picture with Bracken that this would be a good picture for him.

The Court: I think his answer simply qualifies his explanation. I should think you would want that in.

Mr. Abeles: I want the whole thing out.

The Witness: I know one thing that is not based on a famous play that was re-made by Paramount and was very successful, if you want me to go into that.

Q. By Mr. Fendler: Yes.

A. For instance, a picture that is running today. It just opened. It is called Hold That Blonde with Eddie Bracken, the same fellow I am talking about. That was a picture made by Raymond Griffith, which was a comedy. It was made for Paramount years ago. The story was taken from the Griffith picture and re-made for Eddie Bracken. It just opened last night. It is called Hold That Blonde. [489]

Q. By Mr. Fendler: Now, do you have an opinion as to the re-issue rights of the Harold Lloyd picture Movie Crazy as of the present date, taking into consideration the release and distribution of the motion picture So's Your Uncle by Universal during the year 1944 and the first part of 1945?

A. I wouldn't think it would be very good for re-issue or re-make now.

The Court: Do you think it would after a period of time?

(Testimony of A. M. Botsford)

The Witness: It is possible. People forget what they saw in other pictures.

The Court: In another four or five years it might be good?

The Witness: Possibly. That is just a matter of opinion. I don't know.

The Court: You are in that business and I am asking you for your opinion.

The Witness: I would say that in a certain length of time that the re-issue and re-make value might be worth something. Certainly not what it would be worth if it were not for those pictures.

The Court: Did you see the Columbia short?

The Witness: Yes, sir.

The Court: Don't you think that depreciated the value of the Harold Lloyd picture?

The Witness: To some slight extent. Depending on how [490] many people saw the Columbia short and what type of people they were—what kind of theatres it played in and how much audience reaction there was to the picture.

The Court: Any time that sequence is displayed in any great number of theatres it has a tendency to weaken and destroy the value of that sequence for re-issue or re-make?

The Witness: To a certain extent. If it was played in the theatres that are playing along the bowery and in the small grind houses, the type of audience that goes into those houses doesn't matter much.

The Court: Assuming it is played as a short in the same type of theatres?

(Testimony of A. M. Botsford)

The Witness: If it were actually played in the same type of theatres and was seen by the people that saw the feature it would have some effect, yes.

The Court: Don't you think it would have a substantial effect?

The Witness: No, I don't. In other words, I only base it on how you feel about purchasing—if you are going to purchase Movie Crazy and somebody else tells you there has been a Columbia short made which uses that sequence, you might have some—you might mark it down a little bit, but not very much. But then somebody else tells you, "Well, there is a feature being made which has the sequence in it." Then the market is entirely off. In other words, I think there is some [491] damage but nothing like the feature picture damage. That is just my personal opinion.

The Court: That is your opinion based upon your experience in the industry?

The Witness: Correct.

Q. By Mr. Fendler: Are shorts and features in competition ordinarily, Mr. Botsford?

A. No, not at all.

The Court: You could not run a feature and a short with the same sequence in them simultaneously?

The Witness: No, I wouldn't think so.

The Court: Or even reasonably close together?

The Witness: I think you would be crazy if you did.

The Court: I mean it would not be good business?

The Witness: No, it is not good business.

Q. By Mr. Fendler: But in the sale of motion pictures to exhibitors or in the exhibition of motion pictures,

(Testimony of A. M. Botsford)

for example in Paramount-Publix Theatres is a short generally considered comparable to a feature?

A. No, sir.

Mr. Abeles: I object to that, if the court please. I think it is wholly immaterial.

The Court: I have made myself clear that I feel a showing of that sequence cannot help but cause damage to the original story. To what extent it is damaged is a matter of [492] judgment and unfortunately somebody who does not know anything about the industry has to make that decision.

Q. By Mr. Fendler: Are you able, Mr. Botsford, to compare the Harold Lloyd talking motion picture of Movie Crazy and Milky Way with respect to story value, cost, success and profits?

Mr. Abeles: I object to that, if the court please.

The Court: Objection sustained.

Mr. Fendler: May I make an offer of proof?

The Court: You may submit your offer in writing at a later time. Counsel, I am doing my best to protect this record so in the event I render a judgment in your favor it will hold water, but you seem to not want me to do that.

Mr. Fendler: I do want you to render a judgment in my favor, your Honor.

The Court: But you don't want me to render a good judgment evidently, in view of the nature and scope of your questions.

Mr. Fendler: Nothing further.

(Testimony of A. M. Botsford)

Cross-Examination.

By Mr. Abeles:

Q. You said, as I recall, that Paramount in your opinion would not buy the re-issue rights to the picture Movie Crazy unless they thought they could make $100,000, is that correct? [493]

A. I did not say Movie Crazy. I said any re-issue. I said if the question came up as to what picture we would re-issue the distribution department would say, "Unless we can make $100,000 on it there is no use of re-issuing it."

Q. So it depends on whether or not they could make $100,000 on the picture?

A. That is an arbitrary figure. They would say they want to make so much money.

Q. You mean make a $100,000 profit?

A. Yes.

Q. When you said whether they bought the re-make rights at $125,000 or $150,000 you meant profits, didn't you?

A. You must have misunderstood me, or I did not make it plain. I would estimate the re-make rights of Movie Crazy depending on who wanted it and for what purpose. Taking those things into consideration it would be a long about $125,000 or $150,000 to buy the rights.

Q. It hasn't any outstanding story?

A. Not outstanding, but a good story.

Q. It is a secondary story, a mediocre story? You don't put that in the same class with Blood and Sand?

A. I put it in the same type as Hold that Blonde.

The Court: Let us not argue.

Mr. Abeles: Just one question and then I am through.

(Testimony of A. M. Botsford)

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Mr. Fendler: Nothing further.

(Testimony of A. M. Botsford)

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A. I put it in the same type as Hold that Blonde.

The Court: Let us not argue.

Mr. Abeles: Just one question and then I am through.

(Testimony of A. M. Botsford)

Q. Did you say they bought the story of Hold That [494] Blonde?

A. No. Re-made the picture from an old story that they owned.

Q. From a story?

A. From a picture they previously made.

Q. You said before they re-made the story, didn't you?

A. They re-made Hold That Blonde from a picture they had formerly made. Naturally there was a story in connection with it.

Q. Was the picture ever released?

A. Which picture? The first one?

Q. Yes, was it? A. The first one, yes.

Q. And the second one? A. Yes.

Q. When did it open? A. Opened last night.

Q. Who was it originally written for?

A. Raymond Griffith.

Q. He is not the same type of comedian as Harold Lloyd?

A. At the time he was making comedies for Paramount he was a good boxoffice bet.

Q. But he wasn't the same kind of comedian?

A. Same type—same caliber but not the same box-office [495] attraction.

Q. He worked on the same type of pictures as Harold Lloyd? A. To a large extent.

Q. Was that story written for that picture? Who wrote it?

A. I think it was written by Paul Armstrong.

(Testimony of A. M. Botsford)

Q. And who was it written for?

A. Written for Raymond Griffith as I remember. It was a long time ago.

Q. You are not sure of that?

A. Well, I know it was a picture that was devised for Raymond Griffith.

Q. You are sure it was not a play before that?

A. No, I am not sure but I don't think it was.

Q. That is all I wanted to know.

A. Certainly was not a prominent play anyway, or I would have remembered it.

Mr. Abeles: That is all.

Redirect Examination.

By Mr. Fendler:

Q. Doesn't the fact that a motion picture is based upon a prominent play or novel necessarily indicate a box-office value or profit which is not attainable by original stories? [496] A. No.

Q. Have original stories in many instances been much more profitable when made as motion pictures?

A. No.

Q. Motion pictures based on plays and stories?

A. Yes.

Q. In some instances—

The Court: Do you think that is proper examination, counsel?

Mr. Fendler: Very well, your Honor.

Mr. Abeles: Just one question.

(Testimony of A. M. Botsford)

Recross-Examination.

By Mr. Abeles:

Q. Do you know one single picture of the type of Movie Crazy with a secondary story, the situation comedy not based on a play or novel that has ever been re-made?

A. Well, Hold That Blonde.

Q. That is the only one you can think of?

A. I could probably give you more if I had a little time to think of them.

Q. But you can't offhand, can you? A. No.

Q. That is all I want.

Mr. Fendler: That is all. Does your Honor have any further questions? [497]

The Court: No questions.

Mr. Fendler: Now, we have nothing further except a stipulation. Have we arrived at the overhead figure, Mr. Knupp?

Mr. Knupp: Well, there is something involved in that question of profits, if the court please, that I don't think is before the court. I don't know how it can be gotten before the court without some reference—that is the question of proportion of profits, if the profits are to enter into the determination of any judgment that is entered in this action. If the question of profits is to be determined or to be considered in arriving at any judgment in this action, the question of the proportion of the profits which are justly attributable to the sequence of the two pictures is something it seems to me would have to be determined by evidence before the court. There is no evidence of that before the court now. The court

heretofore indicated the matter might possibly go to a Master.

The Court: I said the matter of profits but not the apportionment.

Of course I realize that each case has to stand on its own bottom but it has grown into more or less a practice that profits are generally apportioned as in the Sheldon case. The courts to a great extent have followed that procedure.

Mr. Knupp: There are two cases that I know of that the [498] court may have reference to in which I think that was true.

If we could assume or it were stipulated that that were so then we would not think it necessary that any evidence should be offered on the apportionment of profits, but unless we have the assurance of counsel that the question will not be raised sometime or other that there was no evidence upon which the court could properly apportion the profits.

The Court: The court having seen both pictures and heard the evidence, I think it is within the sound discretion of the court, according to the decisions I have read, always bearing in mind that if there is anybody to be hurt it is the infringer.

Mr. Knupp: I think, if the court please, that provision for apportioning profits grew out of the similar provision in the patent law—that expert testimony on that matter would be considered.

In the Sheldon case the plaintiffs offered no evidence at all with respect to what proportion of the profits were justly attributable to the infringing material. The evidence was all offered on behalf of the defendants and the court arrived in that case at its determination, ap-

parently not based on what the experts testified to, but placed the figure high enough where the court said in any event it should not exceed that figure. I understand in the case before Judge O'Connor tried in this District there was expert testimony [499] before the court as to the apportionment of the profits. The only thing that I fear is that there is some question as to whether the court can, without any evidence, arrive at a figure as to what is the just division of the profits as between the infringing material.

The Court: You gentlemen are privileged to introduce all the expert testimony you desire, but in fixing the liability I am going to follow the Sheldon case.

Mr. Knupp: If the court announces that as its determination, I assume then, of course, evidence would be of no value in any event.

Mr. Fendler: We are prepared to offer evidence, if your Honor please, that no allocation or profits can justly be made in this case. We are prepared to offer expert evidence on that at this time.

I would like to say to your Honor with respect to both the Sheldon case and the Stonesifer case that where no damages are pleaded or proven in a case, where the only question is one of profits, and that was the situation in both the Stonesifer and the Sheldon cases, the rule which was adopted there is not applicable to the instant case in any respect and we take the position—

The Court: You don't claim you are entitled to both profits and damages, do you?

Mr. Fendler: Under the copyright act we do claim that [500] we are entitled to both damages and profits, but we do not believe in view of the fact that the Copyright Act requires the profits to be ascribed to that por-

tion of the infringing—to the infringement that any apportionment of profits is possible.

We wish to offer evidence on that score. In other words, this is the sort of a case, if your Honor please—

The Court: Counsel, I recognize the reasoning in the Sheldon case. The only question in my mind is whether 20 per cent wasn't too large an apportionment. That is one of the questions that has been in my mind. I figured that in view of all the cases it has been generally recognized that there is not only this sequence that entered into the value of this picture, but according to the statement made here and the offer of stipulation it was an unsuccessful picture. It only made $20,000 net profits. It wasn't worth producing so far as the studio was concerned; and this sequence was only a part of that picture. There were many other things that went into the making up of that picture.

I have no hesitancy in saying that I had hoped you gentlemen could agree that that would be a proper apportionment. If you cannot I will listen to your evidence.

Mr. Knupp: Just a minute, if the court please. Before we go into that question, the record, I think, in the previous hearing indicates that your Honor said that if the matter of [501] profits was to be gone into it was to be submitted—

The Court: That did not have to do with apportionment, counsel. I never intended to have the question of apportionment referred to a Master. The only thing I was concerned with was as to the details as to how the profits were arrived at—that is, the gross receipts and the proper deductions from them and from those figures determine what the net profits were from the picture.

Mr. Knupp: I think the court will find in all of these cases in which the matter has been submitted to a Master, it has been submitted both for the purpose of determining profits and determining the proper apportionment.

The Court: Well, I take a little different attitude so far as a Master is concerned. I assume my own responsibilities and arrive at my own conclusions in that respect. The only thing that a Master would do would be that which an expert accountant would do.

Mr. Knupp: Well, if the court please, we did not know in advance what your Honor's attitude on that subject might be. We had to assume the court would follow the practice which seems to have prevailed generally with respect to the matter.

The Court: If there is any question about it I will listen to any testimony you care to offer. If Mr. Fendler contends he is entitled to more than 20 per cent he can put [502] on his evidence to that effect.

Mr. Fendler: No, if your Honor please. The evidence I propose to offer is that it is impossible to apportion profits to the infringement.

The Court: Of course even in the Sheldon case, when you come right down to it, it was found impossible to apportion the profits, but the court in its judgment made an apportionment. You have all the elements in this case that you have in any moving picture. But before going any farther, have you gentlemen arrived at a stipulation?

Mr. Fendler: We will stipulate that the profits were the figures read into the record by counsel as of the

date given, namely, $20,517.28. And we request the further stipulation that the item of negative cost of $104,693.42 includes an overhead charge which was not an out-of-pocket expense.

Mr. Knupp: We so stipulate to that, if the court please.

Mr. Abeles: We do not stipulate it was not an out-of-pocket expense. In the Sheldon case they said you could charge overhead.

Mr. Fendler: We are not trying the Sheldon case, if your Honor please.

The Court: Gentlemen, you have given each other statements. Why can't you stipulate as to the correctness of the statement and introduce it in evidence? [503]

Mr. Knupp: That is what we are willing to do, if the court please.

Mr. Fendler: We are willing to do that, if your Honor please, subject to the additional stipulation as to 19 per cent of the negative cost of $104,693.42 being included in it.

The Court: As overhead?

Mr. Fendler: Yes.

Mr. Knupp: We will stipulate to the statement subject to the addition counsel has made, if the court please.

Mr. Fendler: That is satisfactory.

The Court: Then let the statement be introduced in evidence so I will have it before me.

Mr. Abeles: I have the original, if your Honor please, and I will offer it in evidence. I have already read it into the record before.

The Clerk: Defendants' Exhibit I.

(The document referred to was marked as Defendants' Exhibit I, and was received in evidence.)

[DEFENDANTS' EXHIBIT I]

SO'S YOUR UNCLE

Gross proceeds:	
U. S. (to 7/14/45)	$142,283.39
Canada (to 6/23/45)	6,506.74
Great Britain (to 5/26/45)	37,998.34
Other Foreign Countries (various)	16,481.62
Outright sales—domestic (to 7/14/45)	4,539.15
" " —foreign (to 5/26/45)	1,003.68
	$208,812.92
Costs and expenses:	
Negative	$104,693.42
Prints:	
Domestic	12,494.26
Canada	927.30
Great Britain	3,502.03
Foreign (including import duty)	7,257.49
Advertising, censorship, etc.	5,000.00
	$133,874.50
	$ 74,938.42

(Defendants' Exhibit I)

Distribution fees:

25% of U. S. Gross proceeds	$ 35,570.85
30% of Canada, G. B. & foreign	18,296.01
10% of outright sales	554.28
	$ 54,421.14
Profit	$ 20,517.28

No. 4361-BH-Civ. Harold Lloyd Corp. vs. Universal, et al. Defts. Exhibit I. Filed Nov. 16, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

The Court: Is it all right to call it a defendants' exhibit?

Mr. Abeles: It is all right with me.

Mr. Fendler: Now, may I offer my evidence as to the impossibility of apportionment, if your Honor please?

The Court: Yes. [504]

Mr. Fendler: Mr. Botsford.

A. M. BOTSFORD,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination.

By Mr. Fendler:

Q. Mr. Botsford, in your opinion is it possible to apportion profits received from the motion picture So's

(Testimony of A. M. Botsford)

Your Uncle to the particular sequence which has been heretofore designated as the "magician's coat" sequence contained therein?

Mr. Abeles: I object on the ground it is irrelevant, incompetent and immaterial and not the proper proof under the authorities and contrary to the authorities.

The Court: Well, counsel, I have already stated what I am going to do. Why not let him proceed?

Q. By Mr. Fendler: What is your answer, Mr. Botsford? A. No.

Q. In your opinion it is not possible?

A. It is not possible—I don't think so.

Mr. Fendler: That is all.

The Court: That is true of any picture, is it not?

The Witness: That you cannot apportion what part of the picture makes a profit.

The Court: That is what I have in mind. [505]

The Witness: I would not think so. I think you would be a genius if you could.

Mr. Fendler: That is all.

The Court: Do you have any further evidence?

Mr. Fendler: I think that is all.

Mr. Abeles: That is all.

The Court: Gentlemen, I want to see the Columbia short.

Mr. Abeles: What time would be convenient?

(Discussion off the record.)

Mr. Lewinson: Does your Honor want to fix a time for oral argument?

The Court: Gentlemen, there is a serious question in my mind whether I want oral argument.

To be perfectly frank with you I feel there are certain features of this case where counsel can be of more help to me than they have been so far, and that is whether or not the same rules do not apply in Copyright cases that apply in Patent cases.

I have not had time to complete my own research on that question, but it is quite evident that in patent cases, that is, Section 70 of the Code, and Section 25 under which this suit is brought, the language is very similar. The Sheldon case brings out the fact that before the committee that drew the Act that it was modeled after, they had the feeling that probably the same rules would be applied by the courts. [506]

Now, if that is true, as I understand the law and I am making this statement so counsel can correct me if I am wrong—and I want to state as I stated before that I have been so showered with briefs at a late date that I do not know all the points you have covered. You may have covered this. But it is my understanding of the law that if the profits are not sufficient to compensate the plaintiff for his damages, the court can add such an amount so as to compensate him. In other words, if the plaintiff in this case is entitled to recover that recovery is not limited to the profits. That is, if he has been damaged more than his proportion of the profits would amount to, the court can add to that amount which will compensate the plaintiff for the damages suffered by him. He does not have to suffer a loss because of any act on the part of the defendants.

I re-read the Sheldon case last evening and I have been floundering on this question of damages, but that was

the conclusion I came to in the short time I had to study the subject matter.

Contrary to your argument in your brief, I believe there has been an infringement and it is rather difficult for me to understand how counsel can argue to the contrary.

Mr. Lewinson: Has your Honor read my brief or the brief we filed several days ago?

The Court: Yes, I have read that and we have also had a [507] conference in chambers on this matter. But as far as I am concerned, after seeing the picture and listening to the evidence in the case, there is no question in my mind as to there having been an invasion of the Harold Lloyd picture. The only problem confronting me is the question of damages.

I realize that counsel argues that is a speculative question. I think first the court must determine whether there was in fact any damages.

Mr. Lewinson: That is right.

The Court: But because the amount is difficult of determination that does not mean that the plaintiff must be penalized. It is the same thing as a personal injury case. A man may be seriously injured but nobody knows exactly how much he is entitled to receive for his injuries. That is left as a general rule to the good judgment of a jury. They reach out and pick some figure out of the sky and that is the damages and that is all there is to it.

Now, in this case I feel Harold Lloyd has been damaged. However, I am not impressed with the high figures furnished to me by the plaintiff. I have not reached any conclusion on that and I do not wish to do so until I have received your briefs on the law and any facts that you wish to emphasize.

Mr. Knupp has tried a number of cases before me and I think he knows that I prefer briefs and I think he has found out by this time that I generally read them. [508]

Mr. Lewinson: Your Honor, I can see the advantage of having a matter of this kind largely covered by briefs, but because of your Honor's observation a moment ago; that there might be some value in having a short oral argument after your Honor has covered the briefs.

Now, as to the question of liability. I have, apparently, made myself, or have not succeeded in making myself understood at all in my briefs.

The Court: It may not be your fault. It may be the court's fault. I want to say, however, that Mr. Knupp's brief reached me first and I went through it and have gone through it a couple of times. I have not made a careful study of his citations because I felt they were covered in the arguments during our last hearing.

Mr. Lewinson: I do not believe that is the fact, your Honor.

The Court: I felt they were more or less along the same line of argument that we had before and in the cases cited then I did not find the answer I wanted.

Mr. Lewinson: My thought was this: If I have your Honor's difficulty in mind I think a short oral argument would tend to clarify it.

Now, I might say that I was not able to get around to the research that was required on the matter until after the adjournment last time. The original printed brief we filed [509] was only what might be called a stop-gap document. In other words, we had to get it up very quickly and we did not have a change to break the thing down.

Since then I have gone into the rules of the Copyright Office, which I think is very helpful on the matter. I think it is supported by law—

The Court: But, you have cited so many texts I would have to go to the Congressional library to get them.

Mr. Lewinson: They are all in the Public Library. That is where I got them.

At the previous hearing I took the view that in your Honor's mind it was not a question of the magician sequence but it was the question of a comedy sequence. In other words, I think on analysis it breaks down into a matter of burlesque and I think that the authorities are plain—that the element of dramatic composition, which is covered by copyright, does not extend to burlesque or forms of entertainment other than the drama.

The Court: I remember your discussing that point.

Mr. Lewinson: In the other brief we did not press it from that standpoint at all.

The Court: Here is the way I look at the situation. If Harold Lloyd is not protected in this sequence then none of you people who are engaged in the industry have any protection against the lifting of sequences from your pictures. It seems [510] to me that it is as important to you as it is to Harold Lloyd to have your copyrights fully protected and the law strengthened rather than weakened.

Of course I know you are only trying this present lawsuit, but in order that you may fully understand my attitude at this time and so that there will be no occasion for argument, I am going to hold there is an infringement. Now, if the Circuit Court wants to weaken your Copyright law, that is its privilege. I am going to try to strengthen it.

Mr. Lewinson: Your Honor, I do not like to press the matter unduly, but I think as counsel I have a duty to suggest to the court that perhaps after your Honor has thoroughly considered the matter as presented in the 58-page brief filed the other day, and particularly if you listen to brief oral arguments, you may reach a different conclusion because I think your Honor will find that the matter is similar to what the United States Supreme Court has held in the patent laws.

Now, up until the last five or six years the Supreme Court held that the patent laws extended to tying agreements. Now, they have reversed all those cases and held to the contrary.

I think a full consideration of the cases indicate that the Copyright laws do not extend to burlesque, no matter whose routine they are. Where dramatic compositions are concerned they hold differently. [511]

I think your Honor will find it has uniformly been held that a sequence of this kind does not rise to the dignity of a dramatic performance; that it is merely burlesque or slapstick and not the subject matter of copyright. That is the law in this country and the law in England.

Now, I don't know that I will be able to convince your Honor of that.

The Court: The Circuit Court might be able to convince me of it, but I doubt whether you can. I am going to let the Circuit Court settle that issue because I do not believe that Universal pictures, for instance, could put out a comedy with a sequence that is outstanding and your competitor the next week, when he recognized it was going over well, can use the same thing in his picture.

Mr. Lewinson: But they have done it in vaudeville and in circus acrobatics and burlesque from the beginning of time.

As I say, I might not be able to convince your Honor, but if I have an opportunity I think I can. Your Honor cannot tell about that unless I have a fair opportunity to present that matter by oral argument.

As your Honor has already intimated, it is a matter of great importance generally, and far more important than it is in t his particular picture because the testimony shows that gag men use the same gags, and history shows, which is the subject matter of judicial notice, that has always been done, [512] and I think with all deference and all respect and at the risk of making myself obnoxious, that I ought to press upon your Honor that I have an opportunity to present that matter fully by oral argument.

The Court: I shall not deny you that opportunity, but I want to say now if there is any legislating to be done it is going to be done by some court other than this one.

Mr. Lewinson: I think the view that your Honor has tentatively taken would involve judicial legislation and that the view I am expressing is the only view that is consistent with the cases as they now exist and that is the reason I would like an opportunity to present it to your Honor.

The Court: I do not approve of judicial legislation and avoid it as much as possible.

Mr. Lewinson: And I want to guard your Honor against indulging in judicial legislation.

The Court: Well, I have been able to take care of myself pretty well, Mr. Lewinson.

Mr. Lewinson: Your Honor probably can take care of yourself better than anyone else, but on the other hand, it has heretofore been thought that counsel can sometimes aid the court in taking care of itself and that is the province of counsel. But, your Honor, I am not trying to be funny. I am quite serious.

The Court: I appreciate that and I did not intend to be [513] facetious either.

Mr. Lewinson: I am quite serious and earnest in believing that if your Honor gives me an opportunity to present this cause—I have worked on the matter almost continuously since your Honor adjourned the case the last time, and I think I can aid the court in arriving at a conclusion which will be more satisfactory to the court than otherwise. If the court gives an opportunity to me to argue the matter I think it would be time well spent.

The Court: I am not going to deny you the right of oral argument. I have been known to change my mind and I may be wrong in this instance, but in this particular case when there has been, in my opinion, a deliberate plagiarism I will only change my viewpoint because I feel the law will not permit me to protect Mr. Lloyd in his copyrights.

Mr. Lewinson: It is a question as to the extent of his copyright. I really think that I can be helpful to the court in presenting that point. I doubt whether this matter has been presented to the court in any previous case. This involves a different question than is ordinarily involved and I realize that the court's present disposition is the other way, but still with that in mind I make the suggestion for oral argument because the study that I have made leads me to believe your Honor will change your mind.

Mr. Abeles: Your Honor, there is just one thing I want [514] to say. It will take me just a moment. You recall I mentioned that I was attorney for Brunswick-Balke-Collender Company upon the appeal to the Circuit Court of the case of Davilla vs. Brunswick-Balke-Collender Company of New York, 94 Fed. 2d 567. In that case, your Honor, I did not handle the matter in the court below but I took it on appeal, and I had a re-argument there before the District Judge and the same thing came up as today. The court felt in that case the sum of approximately $1200.00 profit was not sufficient to compensate the plaintiff and the court awarded $5,-000 upon the idea that it could award, if the profit was not sufficient or if the proportion of the profit was not sufficient, if your Honor please, to compensate the plaintiff, that the court could award statutory damages, and in that case the court awarded $5,000 damages. I took it to the Circuit Court and it was reversed upon the ground that it being profits the court had no right or authority to award statutory damages. That was only a yardstick in the event damages could not be proved and there were no profits, but there being profits there had to be an apportionment of the profits.

The Court: There is a difference between that case and the one we are trying here. I am not talking about statutory damages. There is evidence in this case upon which I believe the court can make a finding of actual damages.

Mr. Abeles: I understood your Honor was not letting that [515] evidence in upon the ground you could not compare one picture to another.

The Court: I have taken the position, either rightly or wrongly, that if this picture before the infringement

had a value and then after the infringement it had no value, the difference would be the actual damages suffered by Mr. Lloyd, which is the common rule of arriving at damages. Now, if Mr. Lloyd is entitled to recover, I feel that $4,000 would be insufficient compensation.

Mr. Abeles: The defendant cannot be penalized, Judge.

The Court: I am not penalizing him. I realize that the defendant cannot be penalized. All that I can do is to award the damages suffered by Mr. Lloyd caused by the acts of the defendants.

Mr. Abeles: How is he damaged? He has a picture that is shelved for 13 years. It has not been shown that he sold the re-make rights to any picture of this nature. As a matter of fact, the only picture that he says he sold the re-make rights to was that picture he testified to, Milky Way, and there is no price in the record—just imagine no price in there, no evidence at all. As a matter of fact, I was prepared, if they tried to establish a price, to show that they did not get a nickel from the picture. I was prepared to show that and they knew I was and they didn't put it in evidence.

Mr. Fendler: Just a minute. Let the record show at this moment that the— [516]

The Court: Counsel is not under oath.

Mr. Fendler: I know, but the statement is a statement that counsel makes without any foundation, your Honor. I feel that if, as your Honor has indicated, this case goes to the Ninth Circuit Court of Appeals the record should be clear upon what the evidence is that we were offering to show, and if there is any question about that we are going to ask that your Honor reconsider that particular ruling so that we may show that the

rights of Milky Way were sold by Paramount to Goldwyn for $125,000, and that as an additional consideration Goldwyn loaned the services of Teresa Wright, an outstanding actress, to Paramount, and that Paramount paid Teresa Wright's salary at the same rate that she was under contract to Goldwyn for, and that contrary to the usual practice in the industry, the studio loaning out an outstanding actress receives additional consideration for her services, and we offer that for the purpose of showing that a picture comparable to Movie Crazy, produced from Paramount, released within a comparable period of time, with a comparable production cost, but which never even recouped its negative cost, was sold—the re-make rights were sold for $125,000 plus the value of Teresa Wright's services.

The Court: I am not going to argue those facts with you nor listen to such an argument. I have seen the pictures. I have heard the witnesses. I think the court is in a better [517] position to weigh the evidence before the court than counsel for either side.

I know when this case is finished neither side is going to be happy. I am going to give each side, however, full opportunity to take every issue involved to the Ninth Circuit. I shall make my findings just as complete as possible so that when either one of you or both of you take it to the Circuit Court every issue may be decided. And my decision will contain sufficient findings of fact so that there it can be modified or reversed without the necessity of returning it to this court for re-trial.

Mr. Lewinson: Does your Honor want to fix a time now for oral argument?

The Court: How long do you gentlemen desire in order to prepare additional briefs based on what has already been submitted?

Mr. Fendler: I have a three-page answer to counsel's 58-page memorandum which I desire to file. That is the only additional brief I have, and our position on damages is fully set forth in the brief which was mis-filed, but which is now correctly filed. However, I do wish to orally argue the law on the damage situation for approximately 20 minutes, but not over 30 minutes. I am willing to do that now or any time the court may see fit.

Mr. Knupp: So far as this question of damages is concerned, [518] we would like to submit and we will submit it before the time of oral argument, a brief resume of our position, with a statement of the case, but I assure your Honor it will be brief.

The Court: Gentlemen, I am not going to set this down for oral argument until I have had an opportunity to study the briefs. The one brief of some 58 or 60 pages being presented only a day or two before the time of the trial puts the court at a distinct disadvantage. Briefs filed within such a short time of the trial date do not serve the purpose for which counsel have intended them to serve. In other words, unless I study those briefs and give them careful consideration the time in their preparation has been wasted.

Mr. Knupp: I suggest to the court, if it is satisfactory, that we be given a limited time in which to file any additional briefs we want to file before your Honor proceeds to the question of oral argument.

The Court: How long do you want?

Mr. Knupp: Ten days.

The Court: I do not feel I would have time to go over them before December 10th. That being true, I will set it for oral argument at 2:00 o'clock December 10th.

Mr. Fendler: That is satisfactory, but I would like to have ten days in which to reply.

The Court: If you feel you need ten days in which to reply then I will set it down for argument at two o'clock on [519] December 17th.

Mr. Fendler: That is satisfactory.

Mr. Abeles: Then we will have an opportunity to reply to his brief. I read some of his briefs. We put in a brief and he takes the cases and messes them all up. I mean you have got to go back and straighten him out because he never puts the facts down or the law the way it is. He just jams it up.

Mr. Fendler: I am making no comment.

Mr. Knupp: If the court please, there is only one other thing. We want to reserve the right to file a motion to strike. I suppose we may submit that in writing at any time?

The Court: Yes. We will adjourn this matter until two o'clock December 17th.

(Whereupon, at 3:35 o'clock p. m., the hearing in the above entitled matter was adjourned until 2:00 o'clock p. m., December 17, 1945.) [520]

Los Angeles, California, Monday, December 17, 1945
10:00 a. m.

The Court: Are you ready to proceed, gentlemen?

Mr. Knupp: We are ready.

Mr. Fendler: Ready for the plaintiff.

The Court: Gentlemen, I have viewed the Columbia short called Three Wise Saps. I feel the record should show that I saw that picture under stipulation of counsel and that it should be considered as a part of the evidence in this case.

Mr. Fendler: It may be so stipulated and marked.

Mr. Knupp: Yes.

Mr. Fendler: As Defendants' Exhibit next in order.

Mr. Knupp: I think it has already been designated by an exhibit number, if the court please. It may be necessary to bring it in and have it actually marked by the clerk.

The Clerk: It has been marked.

Mr. Knupp: Was it actually marked, Mr. Clerk?

The Clerk: Yes.

Mr. Knupp: Identified by an exhibit number but I did not know whether it had ever been marked. We would like permission to bring it in if it has not and have it marked.

The Court: It should be made a part of the record in the case.

Mr. Fendler: So stipulated.

The Clerk: It is Defendants' Exhibit E. [523]

The Court: Gentlemen, this is the time set for oral argument. I feel in view of the fact that nearly 200 pages of briefs have been submitted to me it is no more than fair that counsel be restricted in their oral argument to matters they have not heretofore presented in their briefs.

Mr. Fendler: I shall be very glad to restrict myself to matters which are not covered in my briefs. I shall not cite any additional authorities but I do wish to call a few matters to your Honor's attention. Also I think there is an offer of proof which your Honor directed be filed in writing.

The Court: That will be deemed filed for the reasons heretofore stated. The evidence has been rejected.

Mr. Knupp: We have a motion to strike, if the court please, which is filed pursuant to the permission which the court gave us which relates to the evidence which has been offered in connection with the value of the motion pictures or scenarios other than the one which is involved in this suit.

The Court: I have not admitted in evidence any valuation of other pictures, have I?

Mr. Knupp: The motion to strike went to the question, if the court please, whether or not opinion evidence with respect to the value of the Lloyd picture before the Universal picture was made and the evidence with respect to its value after the Universal picture had been produced and [524] exhibited. We contended of course, if the court please, that evidence was entirely speculative and conjectural and damage could not be fixed in that way because of the uncertain character of the proof. I think that was the ground upon which the objection was first raised in this court. It was in connection with the opinion of some witness who was offered by the plaintiff seeking to establish the value of the re-issue rights and re-make rights of the Lloyd picture Movie Crazy.

The Court: I understood that I had restricted the evidence as to any particular picture except as was brought out in qualifying the various experts. Of course you ob-

jected to the receipt of opinion evidence as to the matter of damages.

Mr. Knupp: That is right, if the court please, and that is the only matter to which this motion to strike is addressed.

Mr. Lewinson: May I make a suggestion, your Honor? My impression was that the understanding was that we might make this motion prior to the opening of the arguments, but that your Honor would not rule on it until you decided the case because obviously there would be no point in ruling on the motion pro forma now because that would be just the same as having ruled on the objections.

The Court: I have ruled on the objections. [525]

Mr. Lewinson: But subject to a motion to strike and we are now making the motion to strike, and it may be that at the conclusion of the arguments when your Honor comes to determining the case you may reverse that ruling. I understood that is what your Honor had in mind when you suggested that the evidence might come in subject to a motion to strike because as I took it your Honor did not want to slow down the trial by having an elaborate presentation on that at that time.

The Court: The court tries at all times to keep an open mind. Naturally if I have committed any errors I want to correct them.

Mr. Lewinson: That was the thought underlying my suggestion.

Mr. Knupp: May we then file this motion at this time?

The Court: Yes. You may proceed.

Mr. Fendler: Now, if your Honor please, there are one or two matters that I would like to direct your Honor's

attention to, which may have been done indirectly in the brief, but at least not to the extent that I feel is desirable.

In the first place, I think it proper to point out to your Honor that the defendants in this case have assumed a very inconsistent attitude and argument in connection with their position as to— [526]

The Court: Mr. Fendler, under my present state of mind I prefer to hear from the defendants.

Mr. Fendler: Very well, your Honor.

Mr. Lewinson: May it please the court, in presenting oral argument in this matter we have had in mind the suggestion that your Honor has made and we will not undertake to repeat what is in the brief nor to take the matter up in the same way that it is presented in the briefs. On the contrary we will attempt to present background matter which will aid your Honor, we hope and believe, in the examination or re-examination of the cases and in reaching a conclusion.

We would like first again to take up the matter of liability. As to the questions elaborately presented in our brief, which is entitled "An Additional Brief," we will have only a little to add to what is said there and that will be by way of emphasis and high-lighting several matters that appear in the brief.

We think the matter is as fully presented as we know how to present it except for a few additions and comments and therefore we will not take much time on this occasion in threshing over the old straw.

However, there is a point as to liability which has developed rather late in the writing of the briefs and is referred to in the two last briefs filed by Mr. Fendler and briefly referred to in the last brief filed by us. That [527] point we would like to elaborate because we think

it is decisive of the case and is not presented in the brief with anything like the fullness with which it can be presented on oral argument.

Our point there, your Honor, is this. That the plaintiff is not entitled to recover because it appears that the picture Movie Crazy was made "off-the-cuff" so to speak. That is to say, it was not based upon a scenario and therefore it is not entitled to the protection of a dramatic composition but is only entitled to be regarded as a motion picture under the 1912 Amendment and has the status of a photograph. In other words, it is entitled to protection against multiplying of copies but it has no performing rights.

Now, there is only one case in which that point has been raised, and that is the case of Metro-Goldwyn-Mayer v. Bijou Theatre, which is in the 59 Fed. (2d) in the Circuit Court of Appeals for the First Circuit. That case is three times reported. It is reported in the District Court prior to the appeal in the 50 Fed. (2d). It is reported in the 3rd Fed. Supp. after the mandate came down.

Now, in that case in the Circuit Court of Appeals it was definitely held after a full review of the statute and after some attention to the statutory history, that even under the 1912 Act in order to be entitled to the classifica-
[528] tion as a dramatic composition the picture had to be based upon a copyrighted writing which must either have been a novel, scenario, or play, or some other writing.

When the mandate came down in the 3rd Federal Supplement for reasons which do not appear in the opinion, the District Court did not file the mandate. The mandate filed provided for the dismissal of the case unless there were an amendment showing that the picture was based

upon a copyrighted writing, but the amendment was not made in that form but the complaint was nevertheless sustained.

I shall refer briefly to the cases themselves in a few moments, but before doing so I would like first to follow the practice which was followed by the United States Supreme Court in the latest case involving a copyright question. In order not to slow down the argument by making it necessary for your Honor to take down citations or the reporter or Mr. Fendler to do so, I will hand your Honor a list of those authorities to which I shall refer during the course of this branch of the argument. These authorities, with one exception, I think are not cited in the briefs. I would like for the record to show I am now handing the reporter a copy and also a copy to Mr. Fendler as well as the court.

Now, the first case cited in the list of cases to which I have referred, your Honor, Fisher Music Co. v. Witmark & Sons, 318 U. S. 643, decided in 1943. That was a case which [529] did not involve a question similar to the question here but on the contrary it involved the question of whether a copyrighted work was assignable as to the second term for which it might be copyrighted prior to the commencement of that term, and the Supreme Court, the United States Supreme Court devoted ten out of the twelve pages of the opinion to a survey of the history of the statute going back, not only to the statute of 1790 but also to a statute 50 years earlier and then took the legislative history of the Act of 1909, which was involved, and determined the meaning of Congress in the Act from both the statutory history and the legislative history.

Now, it is not going to be necessary for me to go back here as far as the court went in that case, but I do think that a reference to the earlier statutes and the decided cases before the 1909 Act, a reference to the legislative history of the 1909 Act and the history of the legislative history of the 1912 Amendment will be most informing and demonstrate that the decision of the Circuit Court of Appeals in the Metro-Goldwyn-Mayer case is not only persuasive but should be followed here, and I invite your Honor's attention to such a survey of the statutes.

Now in the first place, your Honor, it will only be necessary for me to mention a fact which is already well known to your Honor and that is that prior to 1856 there was [530] no such thing as a protection of performing rights under the Copyright Act. The only protection there was up to that time was a protection against multiplication of copies. In other words, the Act dealt solely with books, maps and similar documents which had to be printed and could not be multiplied or copied. That is the true sense in which copy was used. In 1856 the dramatic or performing rights were introduced and they are known in the cases sometimes as play rights. In other words when you had a drama the Act provided that performing rights were entitled to protection; and except for one change the law is substantially the same in 1909 and 1912 as it was in 1856 in that regard, but there is a very definite difference between the 1909 Act and the earlier acts in one respect, but the difference is not controlling here as against us. On the contrary, it is controlling in our favor.

Now, prior to the 1909 Act, your Honor, nothing could be copyrighted unless it was printed and the manner of filing in the copyright office was different. The procedure

was different than it is at the present time. We need not deal with that but it is important to bear in mind that a drama as well as a book in order to have any copyright protection had to be printed.

Now, the Act of March 3rd, 1891, which was the Act enforced prior to 1909 amendment, specifically so provided. [531] I have in my hand, which I will be glad to leave with the court, if your Honor cares for it at the conclusion of the argument, all of the copyright Acts from 1790 to 1906, published by the Library of Congress, and that Act is found on page 60 of this book at line 25. That is the second authority which is cited in the list of authorities and provision is made for printing.

Now, the United States Supreme Court had occasion to pass upon the effect of the requirement of printing prior to the time of the 1909 Act and it passed upon it in the case of Ferris v. Frohman, which is the third case noted here, which is reported in 223 U. S. 424, 56 L. Ed. 492, decided in 1912.

Now, that case was decided under the 1891 Act and Justice Hughes, as he then was, reviewed all of the Acts prior to that time and pointed out that printing was required. That case came up in this way. There was a stage play which had been presented in England and under the provisions of the English statute if a play were played without being copyrighted, the English law being different in that respect than our own law was at that time, then it was dedicated to the public.

Now, this play was played in England and the defendant obtained a copyright in the United States and the plaintiff Frohman, who of course was a well known producer, acquired [532] the rights to the English work and he brought an action to vindicate his common law rights

against the person who had obtained the copyright. The person who obtained the copyright claimed that the matter had been dedicated to the public by the performance in England and Justice Hughes held it was not dedicated to the public in this country because the English law had no extra-territorial effect and under our law if a matter was not copyrighted and could not be copyrighted if it was not printed. This play was still in manuscript. He held then that the common law rights obtained and the Copyright Law was a false quantity in the matter.

Now, that case emphasizes the fact that up until 1909 it was necessary to have a play printed and published as a book before it could be copyrighted under the Act of Congress.

Now, let us refer to two cases as indicating what the status of motion pictures was before the 1909 Act, under the Act which I have already referred to and then I will come to the 1909 Act and inquire whether any changes had been made and I think it will appear that no changes have been made and then we will see whether any changes have been made by the 1912 Act.

The Court: Counsel, hasn't this been presented in your very voluminous briefs?

Mr. Lewinson: No, I have not presented it voluminously at all, your Honor. I only presented one short paragraph in [533] the supplemental brief on this point. I haven't gone into any of these matters. You will find it in the first section of the supplemental brief where there is merely a quotation, your Honor, from the case in the 59 Fed. (2d) on this point and—

The Court: Very well, proceed. I am willing to listen, but that is a point that has been considered by the court and it is my impression now that I got it out of some of the briefs.

Mr. Lewinson: Mr. Fendler in his reply cited a number of cases and reviewed them. Before reviewing these cases I think if I briefly present the matter to the court by way of this history and background material, which the Supreme Court of the United States now says is the way to look at these things, that it will help your Honor in reaching a conclusion as to the matter. May I proceed with it, your Honor?

The Court: You may proceed.

Mr. Lewinson: Now, there are two cases, your Honor, which show the status of motion pictures under the Copyright Act prior to the 1909 Act and they are the cases which are numbered 4 and 5 in this list of cases. None of these cases, your Honor, except one that is referred to here, which is cited by Mr. Fendler, have yet been cited to the court as far as I am aware. Bleistein v. Donaldson Litho- [534] graphing Co., 188 U. S. 239, 47 L. Ed. That is an opinion of Mr. Justice Holmes and I would like to refer to it very briefly because it is the basic case on the subject.

Now, that case, your Honor, involved a circus poster which was prepared by the artist and published by a lithographing company—the celebrated Currier which preceded the firm of Currier & Ives, whose lithographs have become famous. This circus poster was made from groups in actual life and it was claimed that it was not subject to copyright and there was no protection because it was made from life and Justice Holmes said that others were free to copy the original. That is to say, to make another photograph by grouping the people together and making the same poster, but they were not free to copy the original. In other words, they could not multiply copies.

Now, that was applied to motion pictures very definitely in the next case in the list, American Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 Fed. 262, and in that case which was decided in 1905, you had an early motion picture which was very similar so far as the burlesque feature of it was concerned as the pictures here. The plaintiff made a picture around Grant's Tomb. The idea was that a French nobleman had advertised in the New York papers for a woman to meet him or a girl to meet him at Grant's Tomb—"object: matrimony". She met him there and there were a flock of [535] other women and as a result there was a chase and they were running around and finally she overtook him and forced him to go on with his bargain and it was burlesque and slapstick.

The defendant made a similar picture which showed Grant's Tomb and much of the same scenery and the same sort of action, but it was not copied. It was not a multiplication of the copy of the plaintiff's picture, but it was a new picture and the court denied a preliminary injunction because the evidence did not show it was a copy. It was another picture made from the same thing.

Now, that was the status of motion picture, your Honor, prior to the time of the 1909 Act. In other words, they were copyrighted as photographs. They only had protection against multiplying copies. They did not have any protection against performing rights and we will see presently the same thing was true after the 1909 Act.

Now, let us take the 1909 Act, your Honor, and see whether the 1919 Act made any change. Your Honor will have in mind that the reason, the basic reason apart from whether pictures could be dramatic performances in and of themselves was that the Copyright Act did not

permit the copyrighting of anything that was not printed. Now, what did the 1909 Act do in that regard, your Honor? As I have already stated, the 1909 Act made a change but it did not make a change that affected the situation. In the 1909 Act [536] we have sections 9, 10, 11 and 12 and they provided for the copyrighting of both published and unpublished works. Section 11 dealt with unpublished works and it did not refer to motion pictures. There is some motion picture reference there, but it referred to works of an author of which copies are not reproduced for sale by the deposit with the claim of copyright of one complete copy of such work if it be a lecture or similar production or a dramatic musical or a photograph or other identifying reproductions. Now, that is all there was there.

The copyright office had occasion to interpret that by its rules and as a matter of fact the head of the copyright office testified at the 1912 hearings and said that up to 1912 the pictures were still copyrighted as photographs and only as photographs.

Now, if your Honor will refer to Section 201.4 of the Code of the Copyright office, Subdivisions 412 and 413, Section 201.6 with reference to unpublished works and 201.7 with reference to published works, your Honor will see that, to quote, "B" of 201.7: "Published works are such as are printed or otherwise produced and placed on sale, sold or publicly distributed." Now, that applies even in the present law. There is nothing here that is published or placed on sale. And as to dramatic work, Section 201.6 provides that the copy which may be written or typewritten shall [537] be in convenient form, clean and legible. In other words, it is not possible to comply with the copyright law of 1909 (and I will point out that it is

not possible to comply with it even now as amended in 1912) and bring out a picture which is not based on a scenario under the provisions of dramatic productions.

Now for example in Subdivision 4 of Section 201.4 the court after dealing with dramatic compositions said: "Scenarios are descriptions of motion pictures or settings for the production of motion pictures and are not dramatic works themselves. However, when printed and published they may be registered as books." So that is a basic background.

Now, Mr. Fendler relies on two other sections of the Copyright Act of 1909, your Honor, both of which do not support his proposition and show that as in Zechariah Chafee, Jr. in his article points out, and this is in 45 Columbia Law Review 503, 719, that the Copyright Law of this country, unlike the Copyright Law in England and Canada does not give a general monopoly. It consists of separate monopolies as to separate things and separate remedies.

Mr. Fendler relies on Subdivision "B" of Section 1 that was passed upon by the court in the case to which I have referred and he speaks of "any other version thereof", and it says here, "If it be a literary work."

Now, the history of that, which is given by Mr. Chafee in the article in the Harvard Law Review at 512 to [538] 515—I should say the Columbia Law Review, is this: That prior to the amendment of 1909 the cases permitted the abridgement of a book and that was not protected by copyright and the purpose of this other version thereof is to protect the book which is abridged.

Now, there isn't anything here of that kind. And then of course he relies on the non-dramatic work and says he is dramatizing that. If it is a non-dramatic work, as

I already pointed out, it is necessary for it to be printed in order to have copyright protection and there is no showing of that kind.

He also relies on a sentence that was added to Subdivision "D" of Dramatic Rights in the Act of 1909 and says that that applied to motion pictures.

Now, I will give the history of it in a minute. It does not apply to motion pictures at all. It was aimed against motion pictures—that is beginning with the procuring or making of any transcription or records thereof and so forth.

Now, he says that applies to motion pictures. Here is the history of that provision, your Honor, as found in the arguments before the committee, which is indicated here. The Supreme Court had decided the Music case by which it held that a musical composition was only pirated when a copy was made of the notes—that a pianola record did not pirate it. Now, at the time this bill was pending in Congress, and it [539] was pending from 1905 to 1909, to February—to March 4, 1909 before it was passed. The case involving the producers of Ben Hur had arisen in the District Court of New York but it had not yet reached the Circuit Court of Appeals or the Supreme Court. It was held in that case in the lower court that the making of the picture Ben Hur was an infringement of the copyright of the novel Ben Hur. The Supreme Court later pointed out that the only thing that was invloved there was the infringement on the novel and not the infringement of a picture or something else. It is a very different question. All right.

The people that waited on the committee of Congress were not the picture people seeking protection but the legitimate drama representatives who themselves were

seeking protection against the picture people and this provision was included to protect the legitimate drama.

I can give your Honor the page reference to the hearings on that if your Honor cares for it. I have it here. As a matter of fact, that section was drafted by the counsel for the legitimate theatre people and was presented by their attorney on March 26, 1908 and the attorney was Mr. Johnson. He made his argument and presented his amendment which was adopted almost verbatim, and if your Honor will permit me I shall not read his argument—

The Court: Counsel, let me say this. I realize your [540] theory presents some question of doubt but I am going to let the Circuit Court of Appeals settle that doubt.

Mr. Lewinson: I think if your Honor will permit me to continue it will not take more than 15 or 20 minutes to present this feature of it.

The Court: I am perfectly willing to listen to your argument, but I am advising you in advance you have a point that, so far as I am concerned, the Circuit Court of Appeals is going to have to settle.

Mr. Lewinson: Well, if your Honor's mind is closed on the matter I do not want to take time to present further argument, but, your Honor, I have spent a great deal of time going over this. I have developed the history of it. I have developed the reports of the committees and the history of it and the language of it; the construction made by the Copyright Office which the cases say is entitled to the greatest weight, but I am not going to take the time to present an argument if your Honor does not care to hear it so I will break off.

The Court: I am not saying that I do not care to listen to your argument. I am only saying that this case has been one of my burdens for a number of months.

Mr. Lewinson: I realize that, your Honor.

The Court: And as far as this court is concerned it is going to make its findings sufficiently broad so the Circuit [541] Court can pass upon all your points.

Mr. Lewinson: Well, your Honor, I had hoped that your Honor's mind might be open on the matter and that the presentation of the statutory and legislative history and the authorities—

The Court: I fully realize the point you are making and the court has considered it very carefully. If the industry hasn't sufficient protection and one company can pirate upon the other because it does not happen to have a manuscript copyrighted I think the sooner the industry knows it and throws it open to the wolves the better.

Mr. Lewinson: That isn't, I think, quite the case, your Honor, and I would like to make this closing observation on the point.

Now, when it came to the 1912 amendment the picture companies were only interested in Section 25 which related to damages. That is all they asked for. It was the copyright office itself which, for administrative purposes, introduced the change in Section 12. In addition to that the case in the Circuit Court of Appeals had been decided in 1931, so when this picture was released in 1932 Lloyd could have had a scenario if he wanted to. He did not have it copyrighted. If he did not have his scenario copyrighted he would still have had common law rights in the scenario and that would have given him protection as it gave Frohman pro- [542] tection. However, he made the thing on the cuff so the matter does not involve

any present great issues as to what the industry is doing, because they either copyright their scenarios or they have scenarios and they are either entitled to copyright protection of the scenario or they are entitled to common law protection if they don't do it.

Now, if Lloyd chose to make his picture on the cuff after the matter had been presented to the courts and after the courts had decided that he had no protection—no copyright protection when he did it that way, that was his affair and it does not involve any matter of upsetting settled practices that have been built up since 1932.

Your Honor, I shall not present that point any further because I would rather have your Honor retain some strength and patience for the presentation of the other points on which your Honor has not made up your mind.

Now, I do not know whether there will be any point in saying anything further about the points that are elaborately made in the brief about burlesque not being entitled to copyright protection. Has your Honor made up your mind on that point?

The Court: I have studied the briefs and have reached a definite conclusion relative to the case and am ready to close it now.

Mr. Lewinson: I would like to make just one suggestion [543] on that if I may, with due deference, and that is that your Honor re-examine the case of Whitwer v. Harold Lloyd. I think you will find there, your Honor, that the burlesqueing which was taken and which the Circuit Court of Appeals of this Circuit held was not entitled to copyright protection was of the same character as that here except that it was the climax of a story and it isn't the climax of a story here at all and plays no integral part of it. I think if your Honor will also re-

examine the cases which deal with these murder scenes and other scenes you will find that more of a dramatic nature was taken there than taken here. Now, if upon a re-examination of those features your Honor does not change your mind there isn't anything I can do to help you change it.

Now, I would like to call your Honor's attention to one particular statement, which is the closest we come to a generalization, and that is Frankel v. Irwin, 34 Fed. (2d) 142. The case is cited in our 58-page brief at page 39.

The Court: That is cited in your brief.

Mr. Lewinson: Yes, but there is just one sentence I would like to read if I may and that is the court referred to "Farces, which, unless at least suggestive of genuine human thoughts, desires and intents, are mere slapstick clowning." And I think that fits this like a glove, and if your Honor will consider that is the Whitmer case and the other cases to which I have referred, there isn't anything further that I [544] can say on that.

There is, however, something that I would like to say briefly on the question of damages, your Honor, although Mr. Knupp will follow me at greater length on that point. It may be that the question of whether a picture not based on a scenario at all is entitled to protection as a drama is doubtful, which your Honor apparently things it is—

The Court: I would not say it is not doubtful, but I am going to make my ruling and let the Circuit Court clarify the law in that respect.

Mr. Lewinson: Well, I was merely saying that by way of introduction.

The Court: I am not saying there is nothing to your argument. I do not want you to get that thought at all.

Mr. Lewinson: I did not get that impression.

The Court: There are many points that have been brought up and discussed in this case and frankly I haven't too much confidence in my position.

Mr. Lewinson: I appreciate your Honor making that statement. I did not intend to invade your Honor's ruling or suggest anything contrary to what your Honor has said. I said, "assuming", and I will put it that way, that it may be doubtful, but I do think, your Honor, there is no doubt about this, that plaintiff is not entitled to any copyright protection of re-make rights. [545]

The Court: You have presented that in your briefs, counsel.

Mr. Lewinson: I was going to call your Honor's attention to something else on this version of the matter, but I will pass it, your Honor. I think I shall let Mr. Knupp take up the matter of damages. I had some observations to make but perhaps a fresh mind and a fresh presentation will engage the attention of the court better than anything I can do.

The Court: Counsel, as I have stated before, I have taken this case home with me. I have lived with it. As I stated before, I am not entirely confident that I am right, but the course that I have followed I believe is right and I believe is just and that is as far as I can go.

Mr. Lewinson: Certainly.

The Court: All counsel have presented their case well. They have well represented their clients. They have presented every possible point that able counsel could muster but I am still of the opinion I have heretofore indicated.

Mr. Lewinson: Well, in the spirit of my duty to my client and my duty to the court I have attempted to inform the court as to what we think is the law and even though the court does not accept our views we certainly appreciate the spirit in which the court has handled the case. Your Honor has shown not only a desire but a zeal to do the right thing in the case. The court has not only conscientiously waded [546] through voluminous briefs but has given us every opportunity to present our oral argument and I appreciate it even though I may make no headway on my oral argument, and I want to thank your Honor for the consideration that you have given to the case and for the personal consideration you have given to me.

The Court: The court never resents able counsel vigorously presenting their case. That is one thing that helps the court. It so happens in this case that I feel you are wrong.

Mr. Lewinson: Well, that may be, but I thought we might be able to present the matter more fully but I realize your Honor must control your own court, and I can only say again that I appreciate the spirit in which your Honor has handled the case. I have no personal complaint to make. I feel your Honor has treated me as a lawyer and as a gentleman and given me every consideration to which it thought I was entitled.

The Court: Mr. Knupp.

Mr. Knupp: There are only one or two observations I would like to make if the court please, and I will try to confine myself to matters which have arisen either in the course of the last hearing and which consequently are not covered in the briefs or which are contained in the final brief of the plaintiff. [547]

There has been a lot of discussion and argument about the question of—assuming infringement is established, the plaintiff may be entitled to in the way of remedy.

We have sought to demonstrate to the court that under our view of the law profits having been established the proportionate part of those profits which is justly attributable to the infringement, is the only remedy which the plaintiff can have in this case and it is an entirely adequate remedy.

Now, the plaintiff has argued throughout that the statute, Section 25, which says that the plaintiff may recover damages as well as profits, means that he shall recover both damages and profits.

The Court: Counsel, I agree that plaintiff cannot recover both. It is my position that if there is actual damage and that actual damage exceeds the proportionate share of the profits to which he is entitled, that is all he is entitled to recover. In other words, he is not entitled to recover the actual damages plus profits because the law and statutes do not permit the imposition of a penalty. That is one thing we agree upon.

Mr. Knupp: Well, I am glad to get so far along toward being in accord with your Honor on that proposition. There was one case in particular which counsel referred to in his final brief, Bundy Engineering Co. v. Sheldon, in which he [548] says to the court in so many words that although the profits have been established in that case the court made an award—

The Court: Pardon me, counsel, but in this case I might as well tell you frankly that the court is going to find an amount as the actual damages which is in excess

of the 20 per cent as was followed in the Sheldon case and other cases. I am not going into the "in lieu damage question."

Mr. Knupp: Then that restricts my argument, if the court please, to just this one question, and that is whether or not there is any competent evidence here of damages and that I think has already been pretty thoroughly briefed. I only want to point out, and I think we have already pointed it out in our brief, that really this question is based upon opinion evidence as to the extnet of the diminution in value between the re-issue and re-make rights by reason of the making and production and exhibition of this Universal picture, depends after all upon the reasons which those experts have assigned for believing that that was true.

Mr. Lloyd himself said that he thought his rights had been injured because of the fact that people would get tired of seeing this sequence and because the public would class him as an imitator. Well, as a matter of fact, I think the evidence here will establish that this Columbia picture which [549] was exhibited prior to the Universal picture was exhibited in more theatres and upon more occasions than was the Universal picture. Mr. Lloyd was entirely logical in his first statement that the damage was due to the fact that the public would get tired of seeing the sequence expressed and that without any question in his opinion the Columbia picture had done him some harm. He says in so many words, if I might just call your Honor's attention to it for just a moment, he said: "I would say it done me a great deal of harm if it had been played in all the theatres the other had played in," and he has reference there, of course, to the Columbia picture.

Then when he was brought back on the stand counsel asked him this question: "At the previous hearing, Mr. Lloyd, you testified that you did not know what theatres the Columbia short had been exhibited in nor the type of theatres it has been exhibited in or played in. By that you believed that the Columbia short might have done you a great deal of harm if it had played in all the theatres that the Universal feature picture So's Your Uncle played in. Do you desire to correct that answer?"

Then Mr. Lloyd said, "I have had time to think it over. My opinion is that a short does not compete with a feature picture. In the first place, a great many times shorts are purchased by the theatres but are not always shown. Many [550] many times—a great many times in the evening they haven't time to show them. Sometimes they are purchased and never shown. Another thing, in this particular short, the Columbia, it is one so badly and so unbelievably bad and it is in such a hodge-podge of comedy sequences that I cannot possibly see how that could do anything but very minor damage and certainly not keep us from remaking or re-issuing a picture.

"Q. In your opinion then the circulation of the Columbia short during the years 1942 and 1943 did not impair the value of the re-issue or re-make rights of your motion picture, is that correct?

A. That is correct."

I only want to suggest to the court that after all, Mr. Lloyd having based his opinion that the Universal picture had done him a great deal of harm upon the proposition that the public would be tired of seeing the sequence, he now comes right back and tells your Honor directly that he did not think that the exhibition of the Columbia picture had harmed his re-issue or re-make rights. So I

say that the very basis upon which he contends that he has been damaged has now been shown to be without substance. As a matter of fact, if the court please, Mr. Lloyd went to see this Columbia picture for the express purpose of determining whether or not any harm had been done to him by its production and exhibition, so that when he got on the stand in the first place and testified that [551] the Columbia picture had done him a great deal of harm he was not testifying as a matter of snap judgment. He got on the stand expecting to testify to that very thing. He had seen the picture in order to be able to testify to that very thing and when he comes back and tells the court that now he is satisfied the Columbia picture did him no harm, I say that it establishes his testimony is entirely untrustworthy. I do not think there is any more reason to think he would so testify with respect to the Columbia picture than there is reason to believe that if he was put on the stand again he would testify to the same thing so far as the Universal Picture is concerned. I cannot see any distinction between the two. They were exhibited in the same character of theatres and the Columbia picture was exhibited to more people, so if his basis for damage is that the public would grow tired of seeing the sequence I think his testimony is shown to be without merit.

There is one other thing in connection with that matter of damages I want to call to the court's attention and then I am through. Mr. Fendler had on the stand his last witness, Mr. Botsford and he asked him this question.

The Court: I know the testimony that you have in mind. It is set forth in the brief and I have that very thoroughly in mind when fixing damages.

Mr. Knupp: If the court please, it was a matter which [552] your Honor brought out by your examination of the witness, namely, the question of whether or not if he thought that the public would remember this sequence and as a result the re-make and re-issue rights were damaged and if so how long he thought it would be before the public forgot they had seen this picture. He said he did not have any opinion on that but it seems to me, if the court please, that is a matter of opinion that your Honor might as well entertain or I might as well entertain as any expert would entertain because, after all, the question of how long the public is going to remember having seen a particular sequence in a motion picture and it is going to know that it has seen the sequence some place when it goes to see a new motion picture is, I submit, a question where the common judgment of mankind is as good as any expert.

The Court: Do you have anything to say, Mr. Fendler?

Mr. Fendler: I do. I will ask for 15 minutes and I will confine myself to those 15 minutes.

The Court: I do not understand why counsel would want to argue when the court has indicated it is going to rule in his favor.

Mr. Lewinson: We haven't had very much luck. Maybe he can talk the court out of it.

Mr. Fendler: Nevertheless, if your Honor will indulge me for ten minutes, I do feel it my duty to call certain matters to your Honor's attention which were not mentioned in [553] the brief and which I think are proper to address to your Honor.

The Court: Proceed.

Mr. Fendler: In the first place, I wish to say that so far as any judgment which your Honor may render in this case, either for actual damages or statutory damages, you will be equally sustained by the record and by the authorities.

The Court: We will leave that to the Circuit Court. They are the best judge.

Mr. Fendler: May I complete that thought, if your Honor please? Counsel have argued that any apportionment of damage to the sequence taken is impossible for purposes of damages and their expert witness has testified it is impossible for the purpose of profits. Now, all of the authorities—the United States Supreme Court decisions and otherwise, do not make an impossibility of the apportionment but simply say it is difficult of apporment—the test for the application of the "in lieu of the statute." In other words, if your Honor should find difficulty in accurately assessing such damages as are sustained by the infringement or such profits as are properly apportionable to the infringement, the in lieu clause becomes applicable.

Now, I make this point for this reason. We have a case which may reach the United States Supreme Court. We have a case which may become an outstanding decision for the [554] industry. We have a case where the infringement is, to my mind, and I think to your Honor's, a flagrant one, and an infringement where it was deliberate. The producers of the picture were told they were taking it and they took it.

Now although counsel attacks Mr. Lloyd's credibility we do nevertheless have a situation where Lloyd would never have dreamed of letting the re-issue rights of that picture go for less than the figure given, or the re-make rights go for less than that figure.

We have offered the most honest witness and the best qualified witness that we could find in Mr. Botsford, who I wanted to turn over completely to your Honor for examination. Your Honor did ask him a few questions and then referred him back to me. In fact your Honor implied that you thought he was going to testify in my behalf anyhow so it did not make very much difference what I asked him, but the case was continued for the purpose of letting them get an outstanding witness or two and for the purpose of our getting an outstanding witness or two and we got this man who had been assistant to the Paramount Studios for ten years and head of the editorial board, and we thought he was outstanding and honest.

Now, when that man testified that the re-issue rights and the re-make rights of that picture had been destroyed by the Universal picture and that the Columbia short would not [555] have had that effect, we introduced and produced a man whom we felt was outstanding, a man who would give evidence which we felt your Honor would not question. We have introduced testimony showing that the industry will purchase properties for $100,000, $150,000, $200,000 for the re-issue rights and did pay $500,000 for the right to make a moving picture from a property which had not even been tried in motion pictures and where they did not know they would make a profit or not. The point I wish to make to your Honor is that a judgment which is not commensurate with the standards in the industry will not be effective for the purpose of either doing justice in the case itself or advising the industry as a whole as to what the consequences are if they take something without paying for it. In other words, no matter what has been said as to punitive ele-

ments a person is not punished who is required by the judgment of a court to pay the same amount which he would have had to pay the copyright proprietor if he had been honest in the first place.

Now, for just a moment I want to compare the Letty Lynton situation where Metro buys a book for $3,500.00 dealing with subjects in the public domain and they do not buy the picture rights which are valued at $30,000 for a play which has run for 10 or 12 weeks in New York and then they come up before the court and they say that any judgment in excess of $30,000 is punitive because these people were willing to sell their property for $30,000 and the court says "No, even [556] a judgment four times that amount is not punitive." And the logic back of that thing to my mind is that a person cannot steal a property that they don't buy and then come in and get by with the price they would have had to pay in the first place.

Now in that connection I want to direct your attention to the long line of United States Supreme Court decisions from Brady v. Daley on down. Those cases all provide that the statutory penalty is not a penalty. Now, the point I want to make to your Honor is that regardless of whether your Honor adopts the actual damage or statutory damage, if your Honor will permit me to say so, the judgment should reflect something commensurate in the motion picture world with the value of the property taken, and that a half measure or a quarter measure does not do that.

It is all very well for them to argue as they have in their briefs—"It just takes a few minutes. It doesn't mean anything." And so on, but the evidence before your Honor was that this picture was in production for 21

months and if your Honor has been on the motion picture sets, as perhaps you have, you know sometimes they will spend a day shooting the same scene 30 or 40 times and this sequence regardless of the short length of time could very well have taken six or seven or eight weeks of the time of directors, assistant directors and so forth, and the same with camera [557] men and technicians—the extras, and so forth. There is a great deal of money put into such things and these figures which have been given your Honor that this sequence alone cost the Lloyd Corporation $150,000 or thereabouts, are not manufactured figures. They are not fabricated figures. They may seem to your Honor to be more than your Honor would spend if your Honor was producing motion pictures, but nevertheless it is the industry and all I want to say to your Honor is, that we did not have any idea of coming in here and getting statutory damages on the statutory schedule for something we were not entitled to or something that has not been done to us. If that were true it would have gone into national debt figures, but in this case we felt sincerely and conscientiously, and I know Mr. Lloyd did. There is no reason for attacking him as being a thief, a crook or untrustworthy or anything of that sort. He came to your Honor honestly and he said frankly, and we have supported those figures. We have supported it with Mr. Landau, who was their own witness, and we feel very strongly, if your Honor please, that no company should get by with stealing our property and compelling us to come into court and then hope that they can get by with less than the price they would have had to pay for it in the first place.

I want to thank your Honor for the consideration and courtesy that has been shown me. I am sorry for my

share [558] of the burdensome briefs and I am sorry if I have talked out of turn, but we do appreciate your Honor's very careful and exhaustive consideration and we are sorry that it has taken so many weeks and months. [559]

Opinion of the Court

Gentlemen, when this case was presented to me and a jury trial was waived, I realized certain responsibilities were being placed upon the court. I am sorry now that I consented to the waiving of a jury trial. I would prefer to have had the question of damages submitted to a jury.

I have listened to the fanciful figures that come out of the financial world at Hollywood and it is difficult, if not impossible, for a judge who is not a part of that atmosphere to comprehend or appreciate such fantastic figures. That has been one of my difficulties in this case.

The day I saw both of the pictures involved in this litigation I realized that in my own mind there had been an infringement of the rights of the plaintiff. I do not look upon this so-called magician coat sequence as a slapstick affair. While it only takes a few moments or a few minutes to be exhibited, it still has a story. It has a theme that is a part of the whole picture and the defendants have appropriated that sequence which, according to Mr. Lloyd's testimony, was one of the outstanding sequences of his career and I feel that by reason of that there has been suffered by Mr. Lloyd substantial damage.

I look upon the Columbia short very much as Mr. Lloyd looked upon it in his testimony. After witnessing it I realized it was the same theme and in a crude way some of the [560] same incidents were portrayed. But the offending picture, the Universal picture, was not even

camouflaged, and as the evidence shows, it was deliberately appropriated. I don't know how such things happen in the industry. I do not understand how a company with the standing and reputation of the defendant corporation could be involved. However, I do feel that the Columbia short has minimized the actual damage suffered by Mr. Lloyd.

We have on the one hand claims of damages in the amount of $300,000 and on the other hand no damage at all. There is no in-between judgment.

It has been brought out in the evidence in this case that the film, after it has had its run is virtually placed in cold storage and becomes a part of the stock pile for use again at some other date either by the owner or somebody to whom the owner sells the rights to that picture. The evidence also discloses that there is an open market for films that have been successfully displayed.

The fact that you can pick up almost any newspaper and in looking through the ads covering pictures that are on display you will find several that are indicated to be remakes or re-issues. I believe in one paper that was called to my attention the other day there were six pictures that were being re-issued.

I feel that the Harold Lloyd picture was a good [561] picture. I enjoyed it at the time I saw it. As a matter of fact, that was the first time I had seen it and I do know that the sequence involved was one of the outstanding sequences. I find that that is about the only sequence that people who saw the picture in days gone by remembered. When you ask a person: "Have you seen the picture?" they say, "I don't remember it." And then you tell them about this sequence and then they start to tell

you about it and it is a matter of more or less common knowledge that that was an outstanding sequence. Mr. Lloyd testified, I believe, that he estimated his damages at $300,000. I cannot accept that figure. I do not believe that the re-issue value of a picture that originally cost $650,000 or thereabouts, is worth fifty per cent of its original cost after the lapse of time involved here. Similarly I am not impressed with the claim that the value of the picture has been completely destroyed. I feel that that picture still has and will continue to have certain value after a lapse of a reasonable length of time.

On the question of profits I am going to adopt the rule and the reasons for it as set forth in the Sheldon case. I believe that 20 per cent of the net profits would be and I so find, as a reasonable apportionment. As I said before, the court finds it difficult to even attempt to deal in the figures that come forth from Hollywood. As I said before and [562] it was approved in the Sheldon case, the same rule should apply here as in a patent case. It is not my function to penalize the defendants. There is a penal statute for that. It is my function to try to ascertain an amount that I believe is the actual damage suffered and in arriving at actual damages I base them upon what in my opinion is the lessened value of that copyright. In other words, I believe that in a case of this character the only way that actual damages could be established would be to determine the lessened value of the picture by reason of the infringement. There may be other ways, but that is the method that I have followed in this case. I find and fix the actual damages suffered by Mr. Lloyd in the sum of $40,000.00. Then comes the question of attorneys' fees. I do not know whether counsel have any comments to make on that subject but I do

know that three or four attorneys have kept Mr. Lloyd's attorney very busy for many months and able counsel have kept him certainly, using a slang expression, "on the run", and I feel that the sum of $10,000.00 is a reasonable attorney fee in this case.

It may be because I am not a part of the atmosphere of the Hollywood financial world that I have been unfair to Mr. Lloyd, but I can only approach it from my own background. At different times during this case when I have endeavored to bring the parties together I warned you that probably when [563] we finished neither side would be happy because when one person insists on $300,000 I move the decimal point over, and the other party who believes they are not entitled to anything has to pay something. That means nobody is happy.

The attorney for the plaintiff is directed to prepare and submit proposed findings of fact and judgment.

Mr. Fendler: Will your Honor order a permanent injunction?

The Court: As to the injunction I want to say that one reason I believe this picture still has a value is not because of the testimony of one of the expert witnesses entirely but also by reason of the fact that plaintiff's counsel was insisting on an injunction. Now, if his picture had been completely destroyed then there would be no occasion for an injunction and that has been one of the thoughts in my mind that caused me to come to the conclusion that the picture and the rights thereunder had not been completely destroyed.

Mr. Fendler: May there be an impoundment, if your Honor please, and a destruction of the defendants' portion of the picture dealing with the magician's coat sequence?

The Court: I think an injunction is sufficient.

Mr. Fendler: Thank you, your Honor.

The Court: I want the record to show that your motion to strike is denied, gentlemen, so your record will be clear. [564]

(Whereupon, at 12:00 o'clock noon, the proceedings in the above-entitled matter were concluded.)

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 8th day of October, A.D., 1945.

ALBERT H. BARGION
Official Reporter.

[Endorsed]: Filed Feb. 21, 1946. [565]

[Endorsed]: No. 11286. United States Circuit Court of Appeals for the Ninth Circuit. Universal Pictures Company, Inc., a Delaware Corporation and Clyde Bruckman, Appellants, vs. Harold Lloyd Corporation, a California corporation, Appellee. Harold Lloyd Corporation, a California corporation, Appellant, vs. Universal Pictures Company, Inc., a Delaware Corporation and Clyde Bruckman, Appellees. Transcript of Record. Upon Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed March 28, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11286

(Civil Action No. 4361-BH, District Court, Southern District of California, Central Division)

UNIVERSAL PICTURES COMPANY, INC., and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION,

Appellee.

APPELLANT BRUCKMAN'S STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF PARTS OF THE RECORD

Appellant Bruckman (hereinafter sometimes referred to as defendant Bruckman) makes the following statement of points upon which he intends to rely upon this appeal:

1. Plaintiff's complaint does not, nor does any count therein, state facts sufficient to constitute a cause of action or to entitle it to relief.

2. The court erred in denying defendant Bruckman's motion to dismiss plaintiff's complaint.

3. Plaintiff did not prove a cause of action against defendant Bruckman, or show that it was entitled to relief against defendant Bruckman.

4. The court's findings of fact are insufficient to support the judgment.

5. The court's judgment is contrary to law.

6. The evidence shows that plaintiff's motion picture entitled "Movie Crazy" was not entitled to protection under the copyright laws of the United States because said motion picture was not original but was commonplace.

7. The evidence shows that plaintiff's motion picture "Movie Crazy" was not entitled to protection as a drama or dramatic composition under the copyright laws of the United States because said motion picture was not based upon a copyrighted book, play, scenario, or other similar writing, and was not based upon a book, play, scenario, or other similar writing at all.

8. The evidence shows that the portion of plaintiff's motion picture entitled "Movie Crazy" referred to as the magician's coat sequence or comedy routine was not entitled to protection as a drama or dramatic composition under the copyright laws of the United States, because it consisted of entertainment other than drama or dramatic composition, and it was commonplace and not an integral part of the story in "Movie Crazy".

9. The evidence shows that the portion of plaintiff's motion picture entitled "Movie Crazy" referred to as the magician's coat sequence or comedy routine was not infringed by the motion picture "So's Your Uncle", because none of the matter embraced in the motion picture "So's Your Uncle" was an impression or copy of the matter embraced in said magician's coat sequence or comedy routine.

10. The court's finding that during the period of years commencing July 30, 1928, and continuing intermittently to and until December 23, 1933, plaintiff paid defendant Bruckman sums of money aggregating $135,000.00 or more, including the sum of $42,900.00 for said defend-

ant's services and assistance in writing and directing plaintiff's motion picture entitled "Movie Crazy", or paid said defendant any specific sum for said services and assistance, is without support in the evidence, and is contrary to the evidence.

11. The court's finding that the so-called magician's coat sequence was copied and misappropriated by defendant Bruckman in defendant Universal Pictures Company, Inc., motion picture photoplay entitled "So's Your Uncle" from plaintiff's motion picture photoplay entitled "Movie Crazy" is erroneous in that it is without support in the evidence and is contrary to the evidence; and the court's finding that the characters, characterizations, motivation, treatment, action, and sequence of action appearing in the fourth reel of the motion picture photoplay entitled "So's Your Uncle" were knowingly and willfully copied, misappropriated, and plagiarized by defendant Bruckman from a portion of the seventh and eighth reels of plaintiff's motion picture photoplay entitled "Movie Crazy", in that it is without support in the evidence and is contrary to the evidence.

12. The evidence shows that plaintiff did not suffer actual damage from the writing, production, distribution, release, and exhibition of the motion picture entitled "So's Your Uncle", and that defendant Bruckman did not participate in the writing or production or distribution or release or exhibition of the motion picture photoplay entitled "So's Your Uncle".

13. The court's finding that plaintiff has been damaged by defendant Bruckman in the sum of $40,000.00 is erroneous, because it is without support in the evidence and is contrary to the evidence which shows that plaintiff

suffered no damage whatever, and said finding is based entirely on speculation and conjecture.

14. The court's finding that plaintiff's rights to reissue and remake said motion picture entitled "Movie Crazy" were substantially damaged and impaired is without support in the evidence and is contrary to the evidence which shows that plaintiff's right to remake said motion picture is not protected by the copyright laws of the United States.

15. The damages awarded by the court against defendant Bruckman are excessive.

16. The court's judgment is contrary to law because plaintiff was not entitled to relief because it came into court with unclean hands.

17. The court erred in overruling the objections of defendant Bruckman to the evidence offered by plaintiff as to the value of its reissue rights of its motion picture entitled "Movie Crazy", as to the value of the remake rights of said motion picture, and as to the difference in value of said reissue rights and said remake rights before and after the production, distribution, release, and exhibition of the motion picture entitled "So's Your Uncle"; and the court further erred in denying said defendant's motion to strike such evidence so admitted over his said objections.

18. The court erred in refusing to permit defendant Bruckman to offer evidence that plaintiff came into court with unclean hands in refusing to receive the evidence

contained in said defendant's offer of proof made in that behalf.

19. The court's judgment is contrary to law because it was based upon a conversation or conversations between the judge of said court and third persons, which conversation or conversations were not offered or received in evidence.

Defendant Bruckman designates the parts of the record which he thinks necessary for the consideration of this appeal as follows:

(Page references in each instance, except the reporter's transcript, are to the record certified by the Clerk of the District Court.)

1. Plaintiff's complaint. (Beginning at page 2.)

2. Answer of defendant Universal Pictures Company, Inc. (Beginning at page 19.)

3. Answer of defendant Clyde Bruckman. (Beginning at page 25.)

4. Plaintiff's waiver of jury trial. (Beginning at page 31.)

5. Defendants' motion to dismiss and the order of the District Court ruling thereon. (Beginning at page 8; beginning at page 12.)

6. Reporter's stenographic transcript of all the testimony taken and proceedings had at the trial in the District Court, and reporter's stenographic transcript of the proceedings had in the District Court on December 17, 1945. (Pages 1-565.)

7. All of plaintiff's exhibits and all of defendants' exhibits offered or received in evidence at the trial in the District Court.

(The trial court having made an order for the certification of all of the exhibits to the appellate court, it is intended that only Plaintiff's Exhibits 1 and 2 and Defendants' Exhibits B, G. H and I shall be printed, it being impossible or impracticable to print the remaining exhibits.)

8. Defendants' motion to strike evidence. (Beginning at page 160a.)

9. Findings of Fact and Conclusions of Law and the Judgment of the District Court entered on January 8, 1946. (Beginning at page 189.)

10. Notice of Appeal. (Beginning at page 200.)

11. Supersedeas and cost bond. (Beginning at page 201.)

12. Designation of record by defendants in District Court. (Beginning at page 203.)

13. Stipulations in District Court relating to record on appeal. (Beginning at page 210; beginning at page 212; beginning at page 219.)

14. Order extending time to April 1, 1946, in which to file and docket appeal of defendants. (Beginning at page 221.)

15. Certificate of Clerk of District Court.

(With the exception of plaintiff's complaint and the final judgment, in all of the foregoing documents the captions, vertifications and proofs of service are to be omitted. In place of captions, verifications, and other omitted matter, the words "Caption", "Duly verified", or other suitable words shall be substituted at the proper places.)

By this designation defendant Bruckman intends to refer to the complete record of the proceedings on the before mentioned motion to dismiss and to all the proceedings and evidence relating to the trial of said action.

Dated March 27, 1946.

LEWINSON & ARMSTRONG and
JOSEPH L. LEWINSON
By Joseph L. Lewinson
Attorneys for Appellant Clyde Bruckman

Service acknowledged March 27, 1946. Harold A. Fendler, Attorney for Appellee.

[Endorsed]: Filed Mar. 28, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT UNIVERSAL PICTURES COMPANY, INC.'S STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL AND DESIGNATION OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF.

The appellant Universal Pictures Company, Inc. states that the following are the points upon which it intends to rely on the appeal in this action, with the designation of the parts of the record which it thinks necessary for the consideration thereof:

1. The alleged infringing incidents are not a material and substantial part of plaintiff's work, playing a role of consequence therein.

2. Such incidents considered independently from the story of plaintiff's work, are commonplace and incapable of copyright protection.

3. Such incidents are not an integral part of the general theme, story or plot of plaintiff's work, but are unrelated and independent comedy accretions comprising gags and stage business.

4. Such incidents are not a structural sequence of plaintiff's story.

5. No part of plaintiff's story has been appropriated.

6. Such incidents are comic accretions to plaintiff's story and not intrinsic to its development.

7. The alleged infringing material consists of only humorous incidents, gags, and comedy and stage business, readily derivable from the public domain, and not subject to copyright protection.

8. The theme and story of the two works are radically dissimilar in plot, action, treatment, development and characterization.

9. Such incidents have no functional relationship whatsoever to the development of the story of plaintiff's work.

10. Such incidents are not essential to the story of either plaintiff's or defendant's work.

11. Such incidents are so insubstantial and so unimportant to the essential structure of plaintiff's work that their appropriation cannot support a claim of copyright infringement.

12. There was no proof of any damages sustained by plaintiff.

13. The question is not what speculatively plaintiff may have lost, but what actually it did lose.

14. Plaintiff's damages being incapable of reasonable ascertainment and not susceptible of proof, were not the subject of recovery.

15. The damages were not based on relevant data, but on mere speculation and guesswork.

16. The only evidence adduced to support the award of damages, are the conjectures and unwarranted estimates of plaintiff's witnesses, instead of the proof of actual damages, established by facts from which their existence may be logically and legally inferable.

17. The award of damages is unsupported by the proof of any facts from which the amount thereof could legally or logically be inferred.

18. The opinions of plaintiff's witnesses as to the amount of damage suffered by plaintiff should have been

excluded, as there was no certain basis of fact upon which their opinions could be based.

19. The award of damages was based entirely upon the speculations and conjectures of plaintiff's witnesses, without the knowledge of any facts from which a reasonably accurate estimate could be made.

20. The award of damages was based upon the erroneous assumption that the evidence established there was an open market for reissue and remake rights to old motion pictures, while the evidence established that such properties had no established or fixed market value by which the damages could be determined.

21. There was no evidence to support the Court's determination that the value of plaintiff's motion picture was decreased to the extent of $40,000.00 by reason of the alleged infringement.

22. The evidence having established that there was no public demand or market for the reissue or remake rights to plaintiff's motion picture, plaintiff sustained no damage.

23. Plaintiff's witnesses were permitted to give their opinion of the damages suffered by plaintiff, although none of such witnesses *was* qualified or in a position to give an opinion as to the value or decrease in value of the reissue or remake rights to plaintiff's motion picture.

24. As plaintiff's motion picture did not have any reissue or remake value, plaintiff did not suffer any damage.

25. The Court admitted the testimony of plaintiff's witnesses as to the damages suffered by plaintiff, upon the erroneous assumption that in Sheldon v. Metro Pictures Corp., 309 U. S. 390, the Court had recognized

the right to prove such damages by the mere opinion of expert witnesses.

26. The Court having determined that regardless of any additional testimony that might be offered, it would follow the rule of law of Sheldon v. Metro Pictures Corp., supra, in allocating 20% of the profits of defendant's motion picture to plaintiff, defendant did not introduce evidence that was available to it and that would have otherwise been offered.

27. The Court made its award of damages upon the erroneous assumption that while it must follow the rule of law of Sheldon v. Metro Pictures Corp., supra, in allocating 20% of the profits of defendant's motion picture to plaintiff, if it felt this was not sufficient, it could arbitrarily add such amount as it deemed essential to compensate plaintiff for the damages it suffered.

28. The Court made its award of damages upon the erroneous assumption that such damages are determined in the same manner as in a personal injury case, by reaching out and picking some figure from the air or the sky, and that is the damages, and that is all there is to it.

29. The Court erred in holding that plaintiff's damages could be fixed entirely by expert opinion as to value unsupported by any facts, on the same basis as real estate or other property.

30. The Court erred in holding that plaintiff's damages could only be established by expert opinion.

31. The Court erred in holding that Harold Lloyd, the president of plaintiff, was defendant's witness, and that defendant was bound by his testimony.

32. The Court erred in holding that defendant could not contradict or impeach Harold Lloyd, the president of plaintiff, and in sustaining objections upon such ground to the interrogatories of said witness by defendant as to material and relevant matter, and in refusing upon such ground to admit proof offered by defendant as to material and relevant matters.

33. The Court erred in basing the damages sustained by plaintiff upon the testimony of plaintiff's witnesses as to the profits that plaintiff might make if it ever should reissue or remake plaintiff's motion picture, or the profits that some other motion picture producer might make if it ever should purchase such rights from plaintiff.

34. The Court erred in basing the damages sustained by plaintiff upon the testimony of plaintiff's witnesses as to the moneys paid by other motion picture producers for the motion picture rights to famous stage plays and literary works.

35. The parties having stipulated that the profits derived by defendant from its motion picture were in the sum of $20,517.28, the award to plaintiff should have been limited to the portion thereof attributable to the use by defendant of the incidents in plaintiff's motion picture, and should not have been augmented by any additional sum which in the opinion of the Court should be added to such portion of the profits, so as to increase the damages to the arbitrary sum of $40,000.

36. The evidence having established that the motion picture produced by Columbia Pictures Corporation entitled "Loco Boy Makes Good", and containing substantially the same incidents, was previously exhibited to a greater extent in the United States than defendant's mo-

tion picture, and in the same locale and type of theaters, plaintiff could not have sustained damages in the sum of $40,000.00 through the subsequent exhibition of defendant's motion picture.

37. The Court erred in sustaining objections to the testimony offered by defendant of its witness George A. Hirliman, after plaintiff's witness Harold Lloyd denied that any of plaintiff's motion pictures had ever been reissued, and in refusing to admit the testimony of said witness, that his company had purchased the reissue rights to one of plaintiff's motion pictures starring Harold Lloyd, for which it had only paid the sum of $3,500.00, and there being no public demand for the reissue or remake rights to any of plaintiff's motion pictures starring Harold Lloyd, that no motion picture exhibitor would buy or license such motion picture, by reason of which the contract with his company was mutually cancelled and the purchase price refunded to his company, which nevertheless sustained a loss of $1,000.00 through the transaction; although the Court admitted plaintiff's testimony as to the price paid for such rights to motion pictures based upon famous stage plays and literary works which were in no way comparable to plaintiff's motion picture.

38. The only material evidence in the record established that even if plaintiff had offered any evidence to show that it had sustained damage, the amount of such damage would have been nominal.

39. In view of the unsound theory of law advanced by plaintiff for the recovery of damages, there should be no award of counsel fees, the amount of which in any event would be entirely disproportionate to the portion of the profits which should be awarded plaintiff if it is de-

termined that there is any liability of defendant to plaintiff.

40. Plaintiff having stipulated that upon receipt of the first communication from plaintiff asserting its alleged claim, defendant sent out instructions to all of its distribution exchanges to stop the exhibition of defendant's motion picture, and that such instructions were complied with, and it appearing from the evidence that defendant was not aware that it was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of damages recoverable by plaintiff should not in any event exceed the sum of $5,000.00.

41. The evidence is insufficient to support any claim upon which plaintiff is entitled to relief.

Appellant Universal Pictures Company, Inc. designates the following as the parts of the record which it thinks necessary for the consideration of the points upon which it intends to rely, namely:

(Page references are to the original certified record filed in this court.)

		Page
(1)	Complaint for damages and other relief from copyright infringement	2
(2)	Motions of Clyde Bruckman to dismiss, to make certain, or for bill of particulars and to strike	8
(3)	Motions of Universal Pictures Company, Inc. to dismiss, to make certain or for bill of particulars and to strike	12
(4)	Minute order made May 14, 1945	16

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(5) Answer of defendant Universal Pictures Company, Inc..... 19

(6) Answer of defendant Clyde Bruckman..... 25

(7) Waiver of jury trial..... 31

(8) Reporter's stenographic transcript of the testimony taken and proceedings had at the trial in the District Court, and reporter's stenographic transcript of the proceedings had in the District Court on December 17, 1945.....(Rep. Trans.) 1 to 565

(9) Appellant Universal Pictures Company, Inc. designates the following as the exhibits which it desires printed in the records:

Defendants' Exhibit G—Letter 3/20 to Blumber, page 406, Reporter's Transcript, following line 12.

Defendants' Exhibit H—Deposition of G. Josephs, page 407, Reporter's Transcript, following line 10.

Defendants' Exhibit I—Tabulation figures "So's Your Uncle", page 504, following line 17.

The trial court has made an order that all of the exhibits offered or received in evidence shall be certified to the Appellate Court and the motion picture films entitled "Movie Crazy" (Plaintiff's Exhibit 3), "So's Your Uncle" (Defendants' Exhibit "D"), and "Loco Boy Makes Good"

Page

(Defendants' Exhibit "E") will be delivered to the Marshal as provided in Rule 18.

(10) Motion to strike 160a
(11) Findings of Fact and Conclusions of Law 189
(12) Final Judgment 197
(13) Notice of Appeal 200
(14) Supersedeas Bond on Appeal 201
(15) Stipulation and Order re Exhibits 210
(16) Stipulation and Order re Reporter's Transcript 212
(17) Stipulation and Order Extending Time to Docket Appeal 221
(18) Stipulation re Record on Appeal 223
(19) Certificate of Clerk of District Court ..... —

While specific reference is made to particular parts of the record, appellant Universal Pictures Company, Inc. desires that there shall be printed the complete record of all the pleadings, proceedings had and evidence taken or offered in the trial court as necessary for the proper consideration of the points upon which it relies.

Dated: April 1, 1946.

JULIAN T. ABELES
MITCHELL, SILBERBERG & KNUPP and
GUY KNUPP
By Guy Knupp
Attorneys for Appellant Universal Pictures Company, Inc.

Service acknowledged April 1, 1946. Harold A. Fendler, Attorney for Appellee.

[Endorsed]: Filed Apr. 2, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and cause.]

CROSS-APPELLANT HAROLD LLOYD CORPORATION'S STATEMENT OF POINTS TO BE RELIED UPON ON CROSS-APPEAL AND DESIGNATION OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF.

In accordance with Subdivision 6 of Rule 19 of the United States Circuit Court of Appeals for the Ninth Circuit, appellee and cross-appellant Harold Lloyd Corporation (hereinafter sometimes referred to as plaintiff), hereby states that the points on which it intends to rely upon its cross-appeal to the above entitled Court are as follows:

1. The judgment for damages is inadequate.

2. The District Court erred in finding that the extent to which plaintiff had been damaged by defendant's infringements did not and does not exceed the sum of $40,000.

3. The evidence shows that plaintiff was entitled to actual damages sustained by reason of defendants' infringements upon plaintiff's copyright in the sum of $250,000 or more.

4. The District Court erred in sustaining defendants' objections to plaintiff's offer of proof relating to the value of reissue and remake rights in and to motion picture photoplays starring Harold Lloyd.

5. The District Court erred in overruling plaintiff's objections to proof offered by defendants relating to the value of reissue and remake rights of motion pictures.

6. The District Court erred in failing and refusing to award to plaintiff statutory damages in the sum of $250,000 or more, under and pursuant to the provision of Sec. 25, subdivision (b) of the Copyright Act of March 4, 1909, as amended.

7. The District Court erred in failing and refusing to award to the plaintiff all of the profits derived by the defendant Universal Pictures Company, Inc. from the production and distribution of the motion picture photoplay entitled "So's Your Uncle".

8. The District Court erred in finding that the profits received and derived by defendant Universal Pictures Company from infringements upon plaintiff's copyright was and is 20% and no more of the total profits realized and derived by said defendant from the production and distribution of the motion picture photoplay entitled "So's Your Uncle". Said finding is without support in the evidence and there is no proper or competent evidence which supports a partial allocation of defendants' profits to infringements upon plaintiff's copyright.

DESIGNATION OF RECORD ON CROSS-APPEAL

Cross-appellant Harold Lloyd Corporation designates the following parts and portions of the record in addition to the record heretofore designated by appellants Universal Pictures Company, Inc. and Clyde Bruckman as necessary for the consideration of this cross-appeal as follows, to wit:

(1) Notice of cross-appeal (beginning at page 209 of the record, certified by the Clerk of the District Court).

(2) Cost bond on cross-appeal (page 214, supra).

(3) Plaintiff's offer of proof (page 161, supra).

(4) Stipulation re record on appeal (page 223, supra).

Dated April 1, 1946.

HAROLD A. FENDLER

Attorney for Cross-Appellant Harold Lloyd Corporation.

Service of the foregoing is hereby acknowledged this 1st day of April, 1946. Lewinson & Armstrong and Joseph L. Lewinson, by Joseph L. Lewinson by W. F., Attorneys for Cross-Appellee Clyde Bruckman; Mitchell, Silberberg & Knupp, by Guy Knupp by E. R., Attorneys for Cross-Appellee Universal Pictures Company, Inc.

[Endorsed]: Filed Apr. 6, 1946. Paul P. O'Brien, Clerk.